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In the Supreme Court of the United States

October Term, 1980

CROFT METALS, INC., and its subsidiaries, BANCROFT MANUFACTURING COMPANY, INC., CROFT ALUMINUM COMPANY, INC., CROFT LADDERS, INC., CROFT METAL PRODUCTS, INC., and LEMCO METAL PRODUCTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. After a bona fide impasse has been reached, does the Company have the right to implement portions of the collective bargaining agreement dealing with working conditions that have been previously agreed to by the parties? If the answer is negative, then does the duty to notify and bargain with the union extend to unforeseen or unplanned changes in working conditions, particularly where there is no authorized representative of the union located at the plant?

2. Where the Court has specifically found that the Company was not guilty of farming out any bargaining unit work, can the Court direct the Company to reopen those production lines that were shut down because of economic necessity, although the shutdowns took place without notification to the union?

3. Can an Employer be found in contempt of a court order for engaging in conduct that at that time was consistent with case law of that circuit as being lawful?

INDEX

Prayer 1
Opinions Below 2
Jurisdiction 2
Statute Involved 2
Statement of the Case 2
Reasons for Granting the Writ 5
Conclusion 8

Appendix—

Decision of the Court of Appeals A1
Report of Special Master A14
Order Denying Petition for Rehearing A104
Management Rights Clause A105

Authorities Cited

CASES

NLRB v. Bancroft Manufacturing Co., 516 F2d 436 (5th Cir., 1975) 3
NLRB v. Katz, 396 U. S. 736 (1962) 5, 8
NLRB v. Crompton-Highland Mills Co., 337 U. S. 212 (1949) 6, 7
NLRB v. Inter-Coastal Terminal, Inc., 286 F2d 954 (CA-5, 1961) 6, 7
NLRB v. United States Sonics Corp., 312 F2d 610 (CA-1, 1963) 6-7
NLRB v. Standard Trouser Co., 162 F2d 1012 (CA-4, 1947) 7

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STATUTES

28 U. S. C. § 1254 (1) 2
29 U. S. C. §§ 151, et seq. 2
29 U. S. C. § 158 (a) (5) 2
29 U. S. C. § 158 (a) (1) 3
29 U. S. C. § 158 (a) (3) 3

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

CROFT METALS, INC., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 30, 1981 (infra, pp. A1-13 (1)).

OPINIONS BELOW

The opinion of the Court of Appeals on the Petitions for Adjudication and Civil Contempt and other relief and the Court's Judgment are unreported and is printed in the Appendix A hereto, infra, pp. A1-A13. The underlying report of the Special Master was filed with the Court of Appeals on December 5, 1979, is also unreported, and is printed in Appendix A hereto, infra, pp. A14-103.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 30, 1981. A timely Petition for Rehearing was denied on March 17, 1981, and is appended in Appendix A, infra, p. A104. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

The National Labor Relations Act, as amended, 29 U. S. C. §§ 151, et seq. The pertinent section of this Act is 29 U. S. C. § 158 (a) (5) which reads as follows:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159 (a) of this Title.

STATEMENT OF THE CASE

This case came before the Fifth Circuit Court of Appeals originally upon a petition filed by the National Labor Relations Board under 29 U. S. C. § 160 (e) seeking enforcement of a bargaining order against the company in which the company had contested a representation election among its employees, and had refused to bargain with the

union in order to have the Board's certification of the union reviewed by the Court. In a "close case" the Court enforced the Board's order to bargain in late 1975. *NLRB v. Bancroft Manufacturing Co.*, 516 F2d 436 (5th Cir., 1975). Subsequently in 1977, the Board filed a motion with the Fifth Circuit Court of Appeals seeking civil contempt of the Court's original order to bargain. This matter was settled by a Consent Order between the Board and the Company and approved by the Court on January 13, 1978. Thereafter, in June of 1978, the Board again sought civil contempt of the Consent Order. After lengthy litigation before a Special Master, the case came before the Court upon the recommendation of the Special Master. On January 30, 1981, the Court issued its Decision. (A1-13). At no time since the Court's original order to bargain has the Company been found to have engaged in interference or coercion of employee rights or discrimination as proscribed in the Act under 29 U. S. C. §§ 157 or 158 (a) (1) and (3).

Shortly after the Fifth Circuit ordered the Company and the Union to bargain, negotiations began in December, 1975, and continued throughout the year of 1976. There were thirty-three bargaining sessions in 1976; four bargaining sessions in 1977; and seventeen bargaining sessions in 1978. The Union engaged in a strike at the Company's plant in Magnolia throughout the year 1977.

During the course of the 1976 negotiations, the vast majority of the contract was negotiated and tentatively agreed upon. Beginning in 1978, there were seventeen bargaining sessions in which all of the open items were discussed and negotiated. By March 10, 1978, the parties were only one word away from a total contract, at which time, as found by the Special Master and the Court, the parties reached a genuine impasse.

Thereafter, in mid-April and early May, 1978, the Company due to economic necessity, was forced to dis-

continue production on four lines. None of the affected employees were laid off but were transferred to other jobs within the plant. Admittedly, this shutdown and transfer of employees took place without notification to the union and opportunity to negotiate. However, testimony of all witnesses before the Special Master, clearly showed that the employer had a consistent past practice of transferring employees when no work was available to other jobs in the plant. This was a practice by the Company from its inception in 1958 and is an industry-wide practice. Moreover, during the course of negotiations with the union, the parties had reached agreement on the following language within the Management Rights clause whereby the employer was granted the exclusive right:

> To transfer employees, to operate as efficiently as possible and to improve the skills and abilities of its employees, . . . and to shut down permanently or temporarily any of its operations, whole or in part. (A105-106).

In reliance upon its practice, as well as the tentatively agreed to article, the Company did not consider that it was engaging in conduct in violation of the Consent Order of the Court; namely, paragraph L of that Order which reads as follows:

> Refraining from making unilateral changes in wages, hours and working conditions and other terms and conditions of employment; failing to give the union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto. (A19).

However, the Board in its motion for contempt alleged, and the Special Master found, that such was the case. The Court on review did not allude in its decision to these important considerations of the Company's well established past practice, or the effect the agreed to article had

on the shutdown and transfers coming after a genuine impasse as they did. However, in adopting the recommended order of the Special Master as noted in the Appendix to the Court's Decision, paragraph I (d) (A8), the Court orders the Company to remedy the shutdown and transfer issue. Likewise in sub-paragraph (j) (A10), the Company is required in the future to notify the union with opportunity to negotiate concerning "transfers of employees."

The evidence at the trial before the Special Master clearly indicated that the Union had no representative located at the plant or in Magnolia or McComb, Mississippi; the closest Union representative lived over one hundred miles away and this representative refused to appoint any member of his committee as a representative for purposes of notice and bargaining concerning the daily routine transfers of employees within the plant. Under this particular condition, it was utterly impossible for the Company to abide by the Consent Order named above concerning unilateral changes.

REASONS FOR GRANTING THE WRIT

This case involves a strained construction of this Court's decision in *NLRB v. Katz,* 396 U. S. 736 (1962). The Order of this Court in paragraph j of the Appendix requires the Company to notify and negotiate with the Union over normal, routine operational adjustments necessary to maintain the daily production requirements. We do not believe this is a proper interpretation of this Court's decision in *Katz,* particularly when viewed in light of the Company's long established past practice of transferring employees from job to job and particularly in view of the impasse that existed between the parties prior to the shutdown and transfer of employees. These issues were squarely before the Court on exceptions to the Special Master's

findings, as well as the petition for rehearing which was denied on March 17, 1981. (A104). The Court further overlooked the undisputed evidence that the parties had an agreement as to what management rights were granted to the Company; namely,

> To transfer employees, to operate as efficiently as possible and to improve the skills and ability of its employees, . . . and to shut down permanently and temporarily any of its operations in whole or in part. [Respondents' Exhibit 17, pp. 101-104.] (A105-106).

In this regard, the evidence clearly indicates that the parties had in good faith negotiated and agreed upon those provisions of the management's rights. The evidence is also clear that the parties, on March 10, 1978, had reached a genuine impasse in negotiations. Therefore, the Employer was at liberty thereafter to place into effect those agreed to proposals. *NLRB v. Crompton-Highland Mills Co.*, 337 U. S. 212 (1949). Indeed, the Fifth Circuit itself has addressed this same issue. In *NLRB v. Inter-Coastal Terminal, Inc.*, 286 F2d 954 (CA-5, 1961), the Court in viewing facts essentially the same as the facts in the present case, held that the Employer did not engage in an unfair labor practice by instituting unilaterally after a genuine impasse, those provisions previously negotiated with the Union. The Court said:

> It can hardly be expected that when both parties had concluded that there was no further reasonable prospect of reaching agreement, following eight (8) genuine bargaining sessions, the company should thereafter be prevented from putting into effect such modifications of its employees-relationships as were reasonably comprehended within its earlier proposals.

Instead of following this line of cases, the Special Master has adopted by the Court below, relied upon *NLRB v.*

United States Sonics Corp., 312 F2d 610, 615 (CA-1, 1963). In *U. S. Sonics Corp.*, the First Circuit adopted the principles of *Crompton Mills*, but went on to hold that prior to instituting the unilateral change previously offered to the union, there must be "notice to and consultation with the union." Clearly then, the state of law is confused by these opposing decisions in two different circuits.

The Court below refused to distinguish or explain its departure from its previous decision in *Inter-Coastal Terminal*. If this is new law, which your petitioner submits is, then the establishment of new law has no place in a contempt proceeding. The Court below slapped a $50,000.00 fine on the Company for engaging in conduct expressly provided for in the Court's prior decision in *Inter-Coastal*, supra. It is difficult to see just how the Company could be in contempt of Court for conduct established as contemptuous in the very same case. A contempt proceeding is no place to attempt to make new law. *NLRB v. Standard Trouser Co.*, 162 F2d 1012 (CA-4, 1947).

The ruling below now requires the Company to call long distance in hopes of finding a union representative before it can transfer an employee on a production line from one area to another. In a plant of over 800 employees, it is difficult to see just how any production can be maintained whatsoever. In the event the Union desires to negotiate concerning the transfer of an employee from one job to another, the Company would be required to wait several hours for a representative to come upon the scene. During this period of time, what are the employees going to do? Will they be required to punch out, or does the Company have to pay them? More importantly, this requirement of the Court below places a tremendous burden on the Company with a tremendous loss and decrease in productivity all to the detriment of everyone in-

volved. It is submitted, that if allowed to stand, the ruling below carries with it a national impact on the total of American industry today. In a time when all economists and government officials are calling for increased productivity as a solution to the inflationary spiral as well as a solution to the competitive impact foreign industry has had on our economy, this decision stands as a roadblock to the progress of these much needed goals. To adequately compete in the world market, the loss of productivity due to increased inefficiencies will have an adverse effect on the nation's balance of payments because of increased imports from foreign nations. We submit that requiring the Company to notify and bargain with the Union concerning all transfers of employees is an unreasonable extension to the principles laid down in *NLRB v. Katz,* supra. For the above reasons, we urge this Honorable Court to review and set aside the Order and Judgment of the Court below.

CONCLUSION

WHEREFORE, Petitioner prays that Writ of Certiorari issue from this Honorable Court to review the Judgment of the Fifth Circuit Court of Appeals in *National Labor Relations Board v. Bancroft Manufacturing Company, Inc., et al,* numbers 74-3052, 74-3101. In the event that the petition is granted, Petitioner prays that the judgment of the Court below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BANCROFT MANUFACTURING COMPANY, INC., Croft Aluminum Company, Inc., et al., Respondents.

Nos. 74-3052, 74-3101.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 30, 1981.

National Labor Relations Board, brought complaint charging that company failed to abide by consent order stipulated to by Board and company. After matter was referred to Special Master, Cecil L. Cutler, Jr., for consid ıtion, the Court of Appeals, Ainsworth, Circuit Judge, held that: (1) master's resolution of factual issues was not clearly erroneous; (2) company's refusal to concede on issue of arbitrability of merit increase determinations did not constitute bad faith bargaining, and therefore, an impasse existed, justifying company's refusal to bargain; and (3) chairman of board of company and its executive vice president were in civil contempt for having violated consent order.

Respondents held in contempt.

1. Labor Relations (Key) 734

There was no clear error in special master's findings that company violated consent order by failing to reinstate

practice of paying Christmas bonuses, that company unilaterally changed morning break time of certain employees in violation of consent order, that company violated requirement of consent order that it rescind merit evaluation system which had been unilaterally instituted, and that company violated consent order by refusing to grant merit increases to unfair labor practice strikers upon their reinstatement.

2. Labor Relations (Key) 734

Special master's findings, contrary to allegations of National Labor Relations Board, that company had not violated consent order by refusing to bargain over job classifications, by failing to pay employees for extra day off preceding holiday, by failing to promptly mail out notice required by order, and by transferring work to other plants were not clearly erroneous.

3. Federal Courts (Key) 849

Clearly erroneous standard does not apply to determinations of special master which are primarily legal.

4. Labor Relations (Key) 177

"Impasse" within meaning of federal labor laws presupposes reasonable effort at good faith bargaining which, despite noble intentions, does not conclude in agreement between parties.

See publication Words and Phrases for other judicial constructions and definitions.

5. Labor Relations (Key) 388.2

Company's refusal to concede on issue of arbitrability of merit increase determinations did not constitute bad faith bargaining, and therefore, an impasse existed, justifying company's subsequent refusal to bargain.

6. Labor Relations (Key) 734

Chairman of board of company and its executive vice president were in civil contempt for having violated consent order stipulated to by board and company.

Petitions for Adjudication in Civil Contempt and Other Civil Relief.

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL, Circuit Judge.

AINSWORTH, Circuit Judge:

This case arises out of the long and troubled attempts of Croft Metals, Inc.,[1] and the Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, to negotiate a collective bargaining agreement covering the employees at the Company's McComb, Magnolia and, Osyka, Mississippi plants. The Union won a representation election held on July 1, 1971. Three years later, the National Labor Relations Board in two separate proceedings found that the Company had refused to bargain with the Union and ordered it to cease and desist from that refusal. 210 NLRB 1007 and 210 NLRB 1019 (1974). This court enforced the Board's orders in 1975, noting that it was "a close case," with misconduct on the part of the Union as well as the Company. *N.L.R.B. v. Bancroft Manufacturing Co.*, 516 F.2d 436, 439 (5th Cir. 1975), *cert. denied* 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976).[2] In May 1977, the Board

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*Judge of the United States Court of Claims, sitting by designation.

1. In addition to Croft Metals, Inc., the respondents in this proceeding include several Croft subsidiaries and two corporate officers.

2. The case reported at 516 F.2d 436 enforced the Board's order reported at 210 NLRB 1007. This court also enforced the Board's other order (210 NLRB 1019) in an unreported decree No. 74-3101 (May 7, 1975).

once again brought the matter to this court charging that the Company had defied the 1975 orders and should be held in civil contempt. That dispute was settled by a consent order stipulated to by the Board and the Company and dated January 13, 1978. In June 1978, the Board charged that the Company had failed to abide by the 1978 consent order, and this court referred the matter to a Special Master for consideration.[3] We now have the Master's report and proposed order before us for decision.

[1, 2] The Master's report comprehensively discusses eleven major issues, most of them factual. First, he found that the Company had violated the 1978 consent order by failing to reinstate the practice of paying Christmas bonuses. The consent order required that the Company, "if requested by the Union, [reinstate] its former practice of paying Christmas bonuses to leadmen and leadwomen, subject to further negotiations about its discontinuance." The Master found that the Union had requested reinstatement of the bonuses for 1978 and that the Company did not reinstate the practice for that year. The Master also found that the Company unilaterally changed the morning break time of certain employees in violation of the consent order's prohibition against "making unilateral changes in wages, hours and working conditions, and other terms and conditions of employment." In so finding, the Master accepted the testimony of employees that the change came in April 1978, after the consent order was issued, rather than earlier. The Master additionally concluded that the Company violated the requirement of the consent order that it rescind the merit evaluation system unilaterally

3. Special Masters in cases like this one are selected from a list supplied by the Chief Hearing Examiner of the Civil Service Commission. The persons on the list are administrative law judges not connected with the NLRB. Judge Cecil L. Cutler, Jr., the Special Master in this case, is an Administrative Law Judge of the Occupational Safety and Health Review Commission.

instituted in November 1978. He found that the Company had initially agreed to rescind the new system but that it did not reinstate the old system and took several months to institute the system the parties later agreed upon. Finally, the Master found that the Company violated the consent order by refusing to grant merit increases to unfair labor practice strikers upon their reinstatement. The Company had argued that the merit increases need not be given to the employees because they were not present to be evaluated at the time the merit increases were given. The Master, noting that over 99 per cent of the nonstriking employees had received a merit increase during the period of the strike, concluded that the strikers would have received an increase but for the strike, and were therefore entitled to the merit increase upon reinstatement. The Master also found, contrary to the Board's allegations, that the Company had not violated the order by refusing to bargain over job classifications, by failing to pay employees for an extra day off preceeding a holiday, by failing promptly to mail out notices required by the order, and by transferring work to other plants. After thoroughly examining the record, the report and the briefs, we hold that the Master's resolution of these factual issues was not clearly erroneous and we therefore adopt his findings. *See N.L.R.B. v. J. P. Stevens & Co., Inc., Gulistan Div.*, 538 F.2d 1152, 1160 (5th Cir. 1976).

[3-5] The other two issues discussed by the Master whether the Company refused to bargain after March 10, 1978, and whether two officers of the Company should be held in contempt are primarily legal determinations, so the clearly erroneous standard does not apply. *N.L.R.B. v. Alterman Transport Lines, Inc.*, 587 F.2d 212, 220 (5th Cir. 1979). Nevertheless, we agree with and adopt the Master's

findings of fact and conclusions of law in this regard. The Company does not deny that it refused to bargain after March 10, 1978, but contends that its refusal was justified since the parties had reached an impasse. " 'Impasse' within the meaning of the federal labor laws presupposes a reasonable effort at good-faith bargaining which, despite noble intentions, does not conclude in an agreement between the parties." *N.L.R.B. v. Big Three Industries, Inc.*, 497 F.2d 43, 48 (5th Cir. 1974). A determination of whether an impasse exists requires examination of what kept the parties from reaching an agreement. The Master found that the Company and the Union would have reached an agreement if they had resolved one final issue, the arbitrability of merit increase determinations. We cannot as a matter of law hold that the Company's refusal to concede on this one issue constituted bad faith bargaining, and we therefore agree that an impasse existed. *See N.L.R.B. v. Crockett Bradley, Inc.*, 598 F.2d 971, 975 (5th Cir. 1979). The Master is also clearly correct in finding that Joseph Bancroft, Chairman of the Board of the Company, and Jean Kuyrkendall, the Executive Vice President, should be held in contempt along with the Company; neither the Board nor the Company contests the Master's finding in this regard.

Finally, the Master recommends that we not assess costs and attorney's fees against the Company "in view of the finding of no liability as to five of the charges . . . ." Master's report at 70. Although the Board is correct in its assertion that the denial of some of its charges does not require us to deny assessment of costs against the Company, we agree with the Master that in a case like this one where all parties, including the Board, have engaged in

questionable tactics,[4] and the costs have been increased by delays which occurred through the fault of neither party, it is best to let each party bear its own costs.

It is therefore ORDERED AND ADJUDGED that respondents, Croft Metals, Inc., and its subsidiaries, Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc., and Joseph Bancroft and Jean Kuyrkendall, are in civil contempt for having violated the order of this court of January 13, 1978. We hereby adopt and incorporate by reference the Special Master's Recommended Final Order set out in the Appendix.

APPENDIX

It is ORDERED that respondents shall purge themselves of civil contempt by:

I

(a) Fully complying with and obeying this Court's judgments of May 7, 1975, and August 14, 1975, and order of January 13, 1978, and not in any way by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of the said judgments and order;

(b) Immediately reinstating the former practice of paying Christmas bonuses to leadmen and leadwomen, as previously requested by the Union, and making whole all

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4. The Master found that "the Board's attitudes and tactics have not always been characterized by impartiality and fairness, and its demands upon the Company, at times, could be termed as 'nit-picking.' " Master's report at 67. He also found that the "overall expenses in this case were unnecessarily increased due to some lack of harmony and cooperation existing between counsel for the parties as well as unanticipated delays which occurred through no fault of either party." Master's report at 71.

leadmen and leadwomen for any monetary losses they may have suffered by reason of the Company's failure and refusal to reinstate the 1977 or subsequent Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court; to continue the practice of paying Christmas bonuses subject to further negotiations about its discontinuance;

(c) If requested by the Union, immediately reinstating the former morning break schedule for glass department employees at its Magnolia facility which existed prior to the April 1978 unilateral change in schedules;

(d) Immediately restoring the *status quo ante* by resuming operations on line one of the Series 20 Department of the Magnolia facility which it unilaterally shut down on about April 14, 1978, and the two second shift lines of the Series 800 Department of said facility which it unilaterally shut down in about April and May 1978; immediately offering to reinstate to their former positions all employees whom it unilaterally transferred to other jobs and departments as a result of the aforesaid shutdowns and the unilateral shutdown of the first shift in the Series 1400 Department from mid-April to about early May 1978, without prejudice to their seniority and other rights and privileges; making all of the aforesaid employees whole for any loss of earnings suffered by reason of their transfers, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court;

(e) Immediately rescinding the oral merit performance evaluation system or any other employee evaluation system unilaterally instituted since January 13, 1978, and immediately instituting the evaluation system agreed upon by the parties during bargaining on about March 9, 1978;

and making all employees whole for any loss of earnings suffered by reason of the Company's unilateral actions with respect to employee evaluations or its reneging on its agreement to implement a new evaluation system together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(f) Immediately, upon the Union's request, returning to the process of bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is full agreement or it is clear that a bona fide impasse has been reached, and if any such understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without further order of the Court;

(g) Immediately, upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed fifteen (15) days from the entry of the adjudication, and thereafter proceeding to bargain for no less than two consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(h) Filing sworn reports signed by the Company and Joseph Bancroft and Jean Kuyrkendall, and by the Union representatives with the said Regional Director, every (30) days showing in detail the nature and course of bargaining in summary form and appending thereto any minutes, proposals, counterproposals, and any written communications between the Union and the Company with respect to such bargaining. If either party has exceptions to the contents of the joint summary, separate additional reports setting forth differences may be filed;

(i) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice

strikers, and according such employees all the rights to which unfair labor practice strikers are entitled, including credit for a ten cent ($.10) merit wage increase found to have been awarded non-strikers during the period of the strike; and making said former strikers whole for any loss of earnings suffered by reason of the Company's failure to accord them all the rights to which unfair labor practice strikers are entitled, including its denial of credit for a merit increase of ten cents ($.10) per hour together with interest thereon;

(j) Refraining from making unilateral changes in wages, hours, and working conditions including layoffs and transfers of employees and transfers of bargaining unit work, work breaks, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto;

(k) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

(l) Immediately posting in conspicuous places in its McComb, Mississippi, offices, and all places where notices to employees are customarily posted at its Magnolia, Mississippi, facility, and at all of its other manufacturing facilities, for a period of sixty (60) consecutive days, copies of this contempt adjudication and of an appropriate notice in the form to be supplied by the Board and signed by Joseph Bancroft, individually and as chairman of the board of directors and chief executive officer of the Company, and by Jean Kuyrkendall, individually and as executive vice president of the Company, which states that the Company, Joseph Bancroft, and Jean Kuyrkendall have been adjudicated in civil contempt of this Court for violat-

ing and disobeying and failing and refusing to comply with this Court's judgments and subsequent order, and that the Company, Joseph Bancroft, and Jean Kuyrkendall will forthwith undertake the action ordered in purgation in the earlier order and this contempt adjudication, said notices, together with a copy of the order and this contempt adjudication, to be maintained in clearly legible condition through such posting period, and insuring that they are not altered, defaced, or covered by any other material;

(m) Immediately duplicating at its own expense, signing by Joseph Bancroft or Jean Kuyrkendall, and mailing copies of the notice and the contempt adjudication to each of its present employees and to each of its former employees employed since the entry of the Court's order of January 13, 1978, and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed, together with proof of mailing;

(n) Requiring each officer, director, and supervisor of the Company, and any individual or agent authorized by the Company to negotiate on its behalf, to signify in writing, under oath, that he or she has been furnished with a copy of the contempt adjudication and of the Court's judgments of May 7 and August 14, 1975, and order of January 13, 1978; and that he or she has read and understands such decrees, and that he or she will conduct himself or herself in all respects consistent with the terms thereof and will in no way by action or inaction, engage in, induce, encourage, permit, or condone any violation of these decrees of the Court. Copies of the aforesaid acknowledgements shall be furnished by the Company to the Regional Director of the Board's Fifteenth Regional Office;

(o) Filing a sworn statement with the Clerk of this court and a copy thereof with the Director of the said Regional Office within fifteen (15) days after the entry of the adjudication in contempt and again at the end of the posting period showing what steps have been taken by the Company and Joseph Bancroft and Jean Kuyrkendall to comply with the Court's directions;

(p) Preserving and making available to the Board for inspection and copying, all books and records necessary or useful in determining whether there has been compliance with the provisions of the purgation order, and necessary or useful to analyze the amounts of backpay due employees or former employees thereunder.

II

The Company shall pay the amount of fifty thousand dollars ($50,000) for its past non-compliance with the provisions of the Court's Order of January 13, 1978, of which it has been found in contempt.

III

To assure a cessation of the violations of the Court's judgments of May 7, 1975, and August 14, 1975, and to assure compliance with the Court's order of January 13, 1978, and with this contempt adjudication, this Court hereby imposes a daily fine for non-compliance against the Company in the amount of two thousand five hundred dollars ($2,500) and in the amount of five hundred dollars ($500) against Joseph Bancroft and Jean Kuyrkendall and any other individual who with knowledge of this order, acts in concert and participation with the Company, Joseph Bancroft and Jean Kuyrkendall to violate this order. The assessment of such fines shall commence 15 days from the entry of the foregoing order and continue so

long as the respondents fail to comply with any of the provisions of this order.

IV

Upon the failure of respondents to purge themselves of civil contempt, the Court reserves jurisdiction to issue attachment against them and any officer or agent of the Company responsible therefor, as well as to substantially increase the amount of compliance fines, and the Court shall take other and further action, and grant such other and further relief as may be adjudged just, reasonable, and necessary to assure compliance with the Court's previous judgments and order, and as this proceeding in civil contempt may require.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket Nos. 74-3052 and 74-3101

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CROFT METALS, INC., and its subsidiaries, BANCROFT MFG. COMPANY, INC., CROFT ALUMINUM COMPANY, INC., CROFT LADDERS, INC., CROFT METAL PRODUCTS, INC., AND LEMCO METAL PRODUCTS, INC.,
Respondents,

and

JOSEPH BANCROFT AND JEAN KUYRKENDALL,
Additional Respondents in Contempt.

REPORT OF SPECIAL MASTER

APPEARANCES:

Peter Ames Eveleth, Esquire, and Norman A. Moscowitz, Esquire, National Labor Relations Board, Washington, D. C. for petitioner.

Yelverton Cowherd, Esquire, W. Kerby Bowling, Esquire, Bowling, Cowherd, Haynes and Scruggs, Memphis, Tennessee, and Gerald M. Abdalla, Esquire, Croft Metals, McComb, Mississippi, for respondents.

PRELIMINARY STATEMENT

Cecil L. Cutler, Jr., Special Master

On May 7, 1975, this Honorable Court entered its decree (docket No. 74-3101) (issued as mandate, May 29, 1975) enforcing the Board's order of May 29, 1974, re-

ported at 210 NLRB 1019, which directs that Bancroft, Croft Aluminum, Croft Ladders, Croft Metal Products and Lemco, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their and other employees' union membership activities, and desires, or threatening its employees with termination or with a cut in their working hours, if the Union were voted in the plant, or interfering with its employees' decisions whether to support the Union.

(b) Refusing to bargain collectively with the Union with respect to wages, rates of pay, hours of employment, or other terms and conditions of employment, or unilaterally changing wages, hours or other terms and conditions of employment without giving the Union an opportunity to bargain on behalf of the employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of the employees in their bargaining unit, herein before described as appropriate, and embody in a signed agreement any understanding which may be reached.

On August 14, 1975, the Court entered its second decree (issued as mandate on October 20, 1975), "four years after a considerable majority of the employees in the Company's plants voted that the Union should represent them

for collective bargaining purposes" (opinion reported as 516 F.2d 436, 447, *cert. denied,* 424 U.S. 914) enforcing the Board's order of May 29, 1974, reported at 210 NLRB 1007, which directs that Bancroft, Croft Aluminum, Croft Ladders, Croft Metal Products, and Lemco, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Southern Council of Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed at Respondent's McComb, Magnolia, and Osyka, Mississippi, facilities, including plant clerical employees, interplant-drivers, and leadmen and leadwomen; excluding over-the-road truck drivers, office clerical employees, professional and technical employees, watchmen, and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

On May 26, 1977, the Board filed its first petition for adjudication in civil contempt and for other civil relief against the Company, alleging that the Company had violated the judgments of May 7, 1975, and August 14, 1975. The Company filed its answer admitting in part, and denying in part, the allegations of the Board's petition. Thereafter, the parties entered into a settlement stipulation, thereby obviating the need for a hearing before me as Special Master designated by the Court.

On January 13, 1978, pursuant to my recommendation that the parties' settlement stipulation be approved, the Court entered a consent order directing that Croft Metals, Inc., its subsidiaries Bancroft, Croft Aluminum, Croft Ladders, Croft Metal Products, and Lemco, and the company's officers, agents, representatives, successors and assigns purge the Company of the violations alleged in the Board's contempt petition by, *inter alia*:

> (a) Fully complying with and obeying the Board's orders as enforced by this Court's judgments of May 7, 1975 and August 14, 1975, and not in any way, by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of said judgments or this order;
>
> * * *
>
> (d) Upon the Union's request, rescinding the merit performance evaluation system which it unilaterally instituted in November 1976, and, if requested by the Union, bargaining with the Union regarding a merit wage adjustment system for the employees in the unit;
>
> * * *
>
> (f) Making whole all leadmen and leadwomen for any monetary losses they may have suffered by reason

of the Company's unilateral termination of the 1976 Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court, and, if requested by the Union, reinstating its former practice of paying Christmas bonuses to leadmen and leadwomen, subject to further negotiations about its discontinuance;

(g) Forthwith, upon the Union's request, bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is a full agreement or it is clear that a bona fide impasse has been reached, and if any such understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without order of the Court;

(h) Upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed 15 days from the entry of the adjudication, and thereafter proceeding to bargain for no less than two consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(i) Furnishing the Union upon its request, at reasonable times and places, and as promptly as circumstances permit, with all relevant information necessary for it to properly carry out its function as the bargaining representative of the Company's employees;

(j) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice strikers, and according such employees all the rights to which unfair labor practice strikers are entitled;

(k) Refraining from refusing to bargain in good faith with the Union;

(l) Refraining from making unilateral changes in wages, hours, and working conditions, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto;

(m) Refraining from failing and refusing to furnish the Union, upon request, in accordance with paragraph (i) above, with all relevant information necessary for it to properly carry out its function as the bargaining representative of the Company's employees;

* * *

(p) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

* * *

(t) Forthwith mailing to each of its present employees and to each of its former employees employed since the entry of the Court's judgment of May 7, 1975, a copy of the aforesaid signed notice and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed.

The order further provides:

[T]hat upon a failure of the Company, its officers and agents, to comply with any provisions thereof, this Court hereby imposes a compliance fine against the Company in the amount of one thousand dollars ($1,-

000.00) per day, commencing 15 days from the entry of the foregoing order, so long as it fails to comply with any of the provisions of this order.

On June 5, 1978, the Board filed a motion with this Honorable Court for assessment of fines against respondent for failing to obey the purgation order respecting violations alleged in the Board's Civil Contempt Petition, for increase of prospective fines, and for other civil relief.

The allegations asserted by the Board in support of its motion will be set forth in detail in this report. The Board asks that a $1,000 compliance fine per day be assessed for each violation found and to assure a cessation of violations that the fine against the Company be increased to $5,000 for each day of noncompliance. In addition, the Board suggests a $1,000 daily fine be assessed for noncompliance against Joseph Bancroft and Jean Kuyrkendall, officers of the Company, and any other individual who, with knowledge of the order, acted in concert and participation with the Company.

The Board further asks that the Court enter an order requiring the Company, its officers, agents, representatives, successors, and assigns, and Joseph Brancroft and Jean Kuyrkendall to purge themselves of such contempt by:

(a) Fully complying with and obeying this Court's judgments of May 7, 1975 and August 14, 1975, and order of January 13, 1978, and not in any way by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of the said judgments and order.

(b) Immediately reinstating the former practice of paying Christmas bonuses to leadmen and leadwomen, as previously requested by the Union, and making whole all leadmen and leadwomen for any monetary

losses they may have suffered by reason of the Company's failure and refusal to reinstate the 1977 Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board subject to further review by the Court;

(c) If requested by the Union, immediately reinstating the former morning break schedule for glass department employees at its Magnolia facility which existed prior to the April 1978 unilateral change in schedules;

(d) If requested by the Union, immediately restoring the *status quo ante* by resuming operations on line one of the Series 20 Department of the Magnolia facility which it unilaterally shut down on about April 14, 1978, and the second shift lines of the Series 800 Department of said facility which it unilaterally shut down on about May 9, 1978; immediately offering to reinstate to their former positions all employees whom it unilaterally transferred to other jobs and departments as a result of both of the aforesaid shutdowns and the unilateral shutdown of the first shift in the Series 1400 Department from mid-April to about early May 1978, without prejudice to their seniority and other rights and privileges; making all of the aforesaid employees whole for any loss of earnings suffered by reason of their transfers, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court;

(e) Immediately rescinding the oral merit performance evaluation system or any other employee evaluation system unilaterally instituted since January 13, 1978, and, if requested by the Union, immediately instituting the evalutaion system agreed upon by the parties during bargaining on about March 9, 1978; and

making all employees whole for any loss of earnings suffered by reason of the Company's unilateral actions with respect to employee evaluations or its reneging on its agreement to implement a new evaluation system together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(f) Immediately, upon the Union's request, bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is full agreement or it is clear that a bona fide impasse has been reached, and if any such understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without order of the Court;

(g) Immediately, upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed 7 days from the entry of the adjudication, and thereafter proceeding to bargain for no less than three consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(h) Filing sworn reports signed by the Company and Joseph Bancroft and Jean Kuyrkendall, and by the Union representatives with the said Regional Director, every ten days showing in detail the nature and course of bargaining in summary form and appending thereto any minutes, proposals, counterproposals, and any written communications between the Union and the Company with respect to such bargaining. If either party has exceptions to the contents of the joint summary, separate additional reports setting forth dif-

ferences may be filed. If, upon investigation and analysis, the Board shall be of the opinion that the Company is not bargaining in good faith, it shall submit a report and supporting brief to the Court and propose appropriate sanctions. If the Court finds a lack of good faith bargaining, sanctions shall be imposed;

(i) Promptly furnishing the Union upon request, at reasonable times and places, with all relevant informaiton necessary for it to properly carry out its function as the bargaining representative of the Company's employees, including information related to the Company's job classification system and any proposed system;

(j) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice strikers, and according such employees all the rights to which unfair labor practice strikers are entitled, including credit for merit wage increases regularly awarded non-strikers during the period of the strike; and making said former strikers whole for any loss of earnings suffered by reason of the Company's failure to accord them all the rights to which unfair labor practice strikers are entitled, including its denial of credit for merit increases, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(k) Refraining from refusing to bargain in good faith with the Union on any mandatory subject, including job classifications;

(l) Refraining from making unilateral changes in wages, hours, and working conditions, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes

and failing to bargain in good faith with respect thereto;

(m) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

(n) Immediately posting in conspicuous places in its McComb, Mississippi, offices, and all places where notices to employees are customarily posted at its Magnolia, Mississippi, facility, for a period of sixty (60) consecutive days, copies of this contempt adjudication and of an appropriate notice in the form to be supplied by the Board and signed by Joseph Bancroft, individually and as chairman of the board of directors and chief executive officer of the Company, and by Jean Kuyrkendall, individually and as vice president and finance director of the Company, which states that the Company, Joseph Bancroft, and Jean Kuyrkendall have been adjudicated in civil contempt of this Court for violating and disobeying and failing and refusing to comply with this Court's judgments and subsequent order, and that the Company, Joseph Bancroft, and Jean Kuyrkendall will forthwith undertake the action ordered in purgation in the earlier order and this contempt adjudication, said notices, together with a copy of the order and this contempt adjudication, to be maintained in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced, or covered by any other material;

(o) Immediately duplicating at its own expense, signing by Joseph Bancroft and Jean Kuyrkendall, and mailing copies of the notice and the contempt adjudication to each of its present employees and to each of its former employees employed since the entry

of the Court's order of January 13, 1978, and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed, together with proof of mailing;

(p) Requiring each officer, director, and supervisor of the Company, and any individual or agent authorized by the Company to negotiate on its behalf, to signify in writing, under oath, that he or she has been furnished with a copy of the contempt adjudication and of this Court's judgments of May 7 and August 14, 1975, and order of January 13, 1978; and that he or she has read and understands such decrees, and that he or she will conduct himself or herself in all respects consistent with the terms thereof and will in no way by action on inaction, engage in, induce, encourage, permit, or condone any violation of these decrees of the Court. Copies of the aforesaid acknowledgements (*sic*) shall be furnished by the Company to the Regional Director of the Board's Fifteenth Regional Office;

(q) Convening during working time, by departments and shifts, all of the Company's current employees, and by Joseph Bancroft at such times, reading to its employees the contents of the said Board notice in the presence of a Board agent;

(r) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the said Regional Office within fifteen (15) days after the entry of the adjudication in contempt and again at the end of the posting period showing what steps have been taken by the Company to comply with the Court's directions;

(s) Reimbursing the Board for all costs and expenditures including reasonable counsel fees incurred since January 13, 1978, in the investigation, preparation, presentation, and final disposition of these proceedings, said amount, unless agreed upon, to be fixed by further order of the Court upon submission by the Board of a verified statement of such costs and expenses;

(t) Reimbursing the Union for all costs and expenditures including reasonable salaries, incurred since January 13, 1978, in the preparation for and participation in the aforesaid collective bargaining negotiations, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by this Court.

(u) Preserving and making available to the Board for inspection and copying, all books and records necessary or useful in determining whether there has been compliance with the provisions of the purgation order, and necessary or useful to analyze the amounts of backpay due employees or former employees thereunder.

By order filed June 28, 1978, this Honorable Court again designated the undersigned to take testimony and receive evidence with respect to the issues raised by the pleadings and to file a report and recommendation thereafter.

A number of motions relating to the pleadings were made by the parties. A motion by respondent to join the Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (J-9), was denied by me on the basis 1) that the Union's presence was not necessary to afford complete relief to those already parties and 2) the Union had no recognizable interest in the subject action (J-15).

The respondent also moved to amend its answer to allege as an affirmative defense bad faith bargaining by the Union (J-8). This motion was granted, among other reasons, because the Union's alleged unwillingness to negotiate could excuse or justify unilateral action by the Company (J-16).

Respondent, following the order of reference, requested that I rule on its motion previously made to the court to dismiss Joseph Bancroft and Jean Kuyrkendall as individual parties. I advised the parties that this was beyond my authority since the motion was directed to the court. I could only recommend action on this following all of the proceedings (J-2).

The Board moved to amend its motion to add a new section (f) to subparagraph 2 of paragraph VIII unilaterally transferring bargaining unit work from its Magnolia plant to other facilities without prior notice to the Union in bargaining (J-29). Respondent's counsel having made no objection, the motion was granted (J-34).

On May 8, 1979, the Board filed a second motion to amend to allege the failure by the Company to bargain over raises in connection with its merit increase program (J-75). Respondent objected and claimed, among other reasons, substantial prejudice (J-76). I concluded the Board had been dilatory and had had ample time to move for amendment of the pleadings. The original hearing for this case had been set for March 19, 1979, and then reset for April 24, 1979. With this in mind and with the belief that the amendment would impose an undue burden upon respondent in preparation for the hearing, finally scheduled for June 4, 1979, I denied the motion (J-77). A motion to reconsider the order (J-78) presented prior to the hearing was likewise denied.

Numerous other motions relating to discovery and other evidentiary matters were made by both parties and were either appropriately ruled on or informally disposed of in prehearing sessions or telephone conference calls. The file reflects the action in connection with these.

Because of the number of issues involved and for the sake of clarity, specific Findings of Fact and Conclusions of Law are set forth following the discussion of each individual issue rather than at the end.

I

The Board alleges that the Company has failed and refused to comply with the Union's request to reinstate its former practice of paying Christmas bonuses to leadmen and leadwomen as required by paragraph (f) of the order and has refused at all times to pay bonuses for 1977 or any subsequent year. The parties stipulated that the Company did not pay Christmas bonuses for leadmen and leadwomen for 1977 and 1978.

In support of the Board's allegation, Mr. William J. Smith testified as to what occurred during negotiations in January 1978 with the Company in regard to the Christmas bonuses. Mr. Smith is presently the assistant to the director of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. At the time, however, he was the Union's representative and chief negotiator at the plant. According to Mr. Smith, the Company asserted that they did not owe bonuses for 1977 and that they were not going to pay them (Tr. 122-123). The Union's position was that, according to the Court Order, the Company was required to pay the bonuses commencing with 1976 and to continue thereafter (Tr. 123). The Union also proposed an alternative to bonuses. This was to require the Company to divide up the total amount previously paid to leadpersons and

then distribute it equally among the leadpersons in addition to their hourly rates of pay (Tr. 124). The Company offered to consider that proposal during the employees' next merit increases (Tr. 124). The Union rejected that suggestion by the Company (Tr. 125). Negotiations continued on this matter until March 1978, and the Union resumed its position of requesting Company compliance with the Court Order (Tr. 126). The Company, according to Mr. Smith, never agreed to reinstate the bonuses but stated that they had been discontinued (Tr. 127).

The Company contends that it was not required to bargain over the bonuses because they were paid at the discretion of the Company and were not a part of an employee's expected pay (Tr. 1214). This is asserted despite the previous Company policy of paying bonuses to both leadpersons and salaried employees (Tr. 1212). Mr. Jean Kuyrkendall's testimony showed that after the end of 1975 the policy of paying bonuses was discontinued as to leadpersons and salaried personnel.

In October 1976 the Company presented to the Union a final proposal on all the "open items" in that year (Tr. 1212-1213). This final proposal did not contain any provision for paying bonuses to leadpersons (Tr. 1213). The Union did question why the bonuses had been omitted in the final proposal and further suggested that the Company spread the bonuses out to all leadpersons and add it to their hourly rates. It also proposed that the money be distributed in a plant-wide employee increase (Tr. 1213-1214). The Company rejected these proposals since the hourly increase would only amount to 2 or 3 cents for leadpersons, and less than a penny per employee if there was a plant-wide distribution of the bonus money (Tr. 1214).

Mr. Kuyrkendall explained that the Company bonus had always been a gratuity. There is no schedule that says

that an individual will receive "a specific amount after any number of years of service or after any specific performance rating" (Tr. 1214). At the end of each year the plant manager and a member of the finance department would review the records of leadpersons and determine if a bonus should be given to each individual or not, and if so, then an amount was agreed on. This amount was subject to review at the end of each year (Tr. 1214-1215). Each leadperson did not receive the same amount of money. And when an employee was promoted to leadperson, that individual was told of the responsibilities and rate of pay for the position but was not told whether he or she could expect to receive a bonus at Christmas (Tr. 1215).

Bonuses were paid to leadpersons in 1976 and the average amount was $50 (Tr. 1216).

In 1978 the Company offered to negotiate with the Union over leadperson bonuses (Tr. 1218). The Union refused to negotiate because the Company had not reinstated the practice of paying bonuses (Tr. 1219). The Company did propose that the bonus amounts be considered in the next merit increase. The Union did not negotiate with the Company on that proposal since it did not involve any commitment on the part of the Company.

In February of 1978, the Company told the Union that it would "initiate the practice of leadmen bonuses," and that it was to be in effect for that year and thereafter (Tr. 1220). Then the Company stated that the parties "should negotiate a proposal dealing with the discontinuance of the leadmen bonuses and deciding what to do with the funds" (Tr. 1220). Mr. Smith stated that he would take this offer under advisement and that he needed to talk with his leadpersons. Mr. Roddie Varnado, a leadperson, was on the bargaining committee and present at this session. The Company suggested that Mr. Smith and Mr. Varnado

take a caucus and discuss the matter, but Mr. Smith did not go along with that. The Company then withdrew their proposal to initiate the bonuses (Tr. 1221). Mr. Kuyrkendall did not recall that the Union ever requested during the 1977 bargaining sessions, either verbally or in writing, that the Company reinstate the Christmas bonuses for leadpersons (Tr. 1221).

Mr. Kuyrkendall admitted that he read the Settlement Order regarding bonuses but stated that it did not specifically mention paying bonuses for 1977 (Tr. 1222).

DISCUSSION

The issue is whether the Company, by failing to reinstate its practice of paying Christmas bonuses to leadpersons is in violation of part of paragraph (f) of the Court Order, which requires the Company to reinstate its former practice of paying Christmas bonuses to leadmen and leadwomen, subject to further negotiations about its discontinuance.

The evidence shows that the Union, on several occasions, did request that the Company reinstate Christmas bonuses and that the Union did attempt to negotiate the discontinuance of Christmas bonuses by suggesting alternative proposals for the distribution of the bonus money.

The Company's position throughout the 1978 negotiations was that the bonus policy had been discontinued at the end of 1975; that it was not required to bargain over bonuses since they were merely a gratuity and not connected to wages; that they were not going to pay bonuses for 1977; and that the Court Order did not specifically require the Company to pay Christmas bonuses in 1977. On only one occasion did the Company propose to "initiate" bonuses and that proposal was withdrawn almost im-

mediately because the Union would not at that time enter into negotiations on the discontinuance of bonuses.

The Company, then, never agreed to reinstate the Christmas bonuses and thereby eliminated any possibility of effective negotiations on this matter. Thus, it appears that the Company maintained a position in direct contravention to a part of paragraph (f) of the Court Order. I, therefore, recommend that the Company reinstate the payment of Christmas bonuses in accordance with the Court Order, which would include paying bonuses for 1977 and 1978 and a continuation of past Christmas bonus practice. Once those bonuses are paid and the practice reinstated, the parties may bargain over the discontinuance of such bonuses.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. In January 1978, the Union requested that the Company reinstate Christmas bonuses for leadmen and leadwomen.

2. The Union made attempts to negotiate with the Company on proposed alternatives to bonuses.

3. The Company has never reinstated the practice of paying Christmas bonuses to leadpersons and has refused to bargain as to bonuses.

4. The Company has not paid Christmas bonuses for 1977 or 1978.

CONCLUSION OF LAW

By failing to reinstate its practice of paying Christmas bonuses, the Company is in violation of paragraph (f) of the Court Order of January 13, 1978.

II

The Board alleges that the Company unilaterally changed the time of the employees' morning break period in the glass department of the Magnolia, Mississippi, facility without notice to or prior bargaining with the Union in violation of paragraph (1) of the Court Order. The parties have stipulated that the Company did not notify or bargain with the Union concerning the Company's change in the Magnolia glass department employees' morning break period (changed from 9:40 a.m. to 9:20 a.m.) prior to effecting it (Joint exhibit 1, page 2). The year in which this change took place is, however, in dispute.

Critical to the determination of whether a unilateral change was made is the time when the break change occurred. If the change occurred in 1976 or 1977, then it would not be a violation of the Court Order which was not issued until January 1978. But if the change occurred in 1978 and it is found to be a unilateral change, then the Court Order has been violated.

The Board contends that the change occurred in April of 1978. Two employees testified in support of the Board's contention. Mr. Charlie Bowens, an employee on the day shift in the glass department since 1976, testified that when he first started tto work for Croft, his break period was at "twenty minutes to 10:00" (Tr. 575) and that in April of 1978, Mr. George Martin told him that the break was going to be changed to 9:20 (Tr. 575). Mr. Bowens stated that he had never requested a change in break time. He said that he was certain that the change occurred in 1978, because he was on strike from January 1977 to January 1978 (Tr. 578-579). Mr. Bowens further stated that he had not been asked, during a meeting with Jim Kuyrkendall and George Martin in September of 1978,

as to whether he had requested a change in the break period (Tr. 582).

Ms. Evelyn Nelson, employed at Croft in the glass department on the first shift from the beginning of 1978 until September of 1978, stated that, when she was initially employed in the glass department, the break period was at "twenty minutes to 10:00" (Tr. 593). According to Ms. Nelson, her supervisor, George Martin, informed her on April 10, 1978, that there was going to be a change in the break period (Tr. 594). She said she was not given any reason for the change, that she had not requested a change, and that the change did go into effect on April 11, 1978 (Tr. 595).

Ms. Nelson was present at a meeting with Mr. Jim Kuyrkendall, Mr. Martin and several other employees in September of 1978. At that time, she said she was told by Mr. Jim Kuyrkendall that, if any of the glass department employees were contacted by the Labor Board in reference to the change in the break period, then the employees should tell the Board representatives that the break had been changed because the employees had wanted it changed (Tr. 595-596).

The Company asserts that the change in the break period occurred in late 1976 or early 1977. Mr. Jim Kuyrkendall, the plant manager, stated that there was no record made of this change in the employees' break time (Tr. 473). He said that supervisors don't check with him on break changes (Tr. 979) and that no employee had personally asked him for a change in the break period (Tr. 995). Mr. Kuyrkendall also stated that he did ask employees in the September 1978 meeting whether they wanted the break change and that all the employees present "nodded their heads in the affirmative" (Tr. 997).

Mr. Jean Kuyrkendall, vice president in charge of finance, testified that he did not know when the break change took place (Tr. 799). He did admit that, in response to Board interrogatories, the Company had stated that the change was made in "approximately April, 1978" (Tr. 799), but since the time when the Company answered the Board's interrogatories, "an investigation . . . revealed that the change in the break period did in fact occur in the latter part of 1977" (*sic*) (Tr. 799).* The change in the break period only affected 20 to 30 people (Tr. 800).

Mr. George Martin, the glass department supervisor for the past four years, testified that personnel in the glass department had come to him and requested a longer time between their break and their lunch period (Tr. 1009). These requests were made either in the latter part of 1976 or the first part of 1977 (Tr. 1010). There was no specific request that the change be made either in the lunch period or in the break period (Tr. 1010).

The Company further supported their case through the testimony of Mr. Kenneth Thames, whose most recent employment with Croft began in November, 1977, and who is presently employed in the glass department. Mr. Thames stated that, when he first started work in the department in November of 1977, he took the 9:20 break (Tr. 1141). He was still taking that same break as of the hearing date (Tr. 1141-1142). On cross-examination, Mr. Thames could not recall his date of termination from his previous employment with Croft nor was he certain of when he had taken breaks during that previous employment (Tr. 1144). He did state, though, that when he had left Croft in 1976, they had had three morning break periods and that for as long as he could remember there had always been three breaks (Tr. 1144-1145).

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*This is a direct quote but Mr. Kuyrkendall probably meant "in the latter part of 1976" since this is the Company's position.

DISCUSSION

One issue in regard to the glass department employees' break change is whether it occurred in late 1976 or early 1977, prior to the Court Order, or in April 1978, after the issuance of the order. The evidence presented by the Board clearly places the change in April 1978, whereas testimony by Company witnesses and supporting evidence does not indicate with any certainty when the change may have occurred. Upon evaluation, the weight of the evidence supports the Board's contention that the break change took place in April 1978.

The second issue is whether the Company, by instituting the change in the break time of the glass department employees in April 1978, made a unilateral change in working conditions and other terms and conditions of employment which would violate paragraph (1) of the Court Order.

Break periods are a term and condition of employment and therefore a mandatory subject of collective bargaining. *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 529 (9th Cir. 1968). The Company's change in the break period without prior notice to or bargaining with the Union constitutes a unilateral change. The fact that an impasse in bargaining had been reached does not affect the requirement of notifying and consulting with the Union prior to any change. *NLRB v. United States Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963).

It is no defense that the unilateral change in the break period was made at the request of employees for it is the duty of the employer to bargain with the certified representative of the employees. Negotiation directly with employees with respect to working conditions is in derogation of that duty to bargain. *Medo Photo Supply Corp. v.*

NLRB, 321 U.S. 678, 684 (1943). Further, it is clear from the evidence that not all glass department employees requested the change. Thus, the statutory right of the employees to bargain collectively through their elected representative was violated.

Therefore, I find that the Company violated paragraph (1) of the Court Order when it changed the glass department employees' break period in April 1978.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The Company changed the time of the glass department employees' break period from 9:40 a.m. to 9:20 a.m. at the Magnolia, Mississippi, facility in April 1978.

2. The change in the break period occurred after the issuance of the Court Order of January 13, 1978.

3. Break periods are a term and condition of employment and thus a mandatory subject of collective bargaining.

4. The Company's change in the break period without prior notice to or bargaining with the Union was a unilateral change in conditions of employment.

CONCLUSION OF LAW

The Company's change in the break period and was a violation of paragraph (1) of the Court Order.

III

The Board alleges that the Company has unilaterally shut down production lines and has unilaterally transferred

employees on those lines since April 1978, without notice to or prior bargaining with the Union.

Mr. Smith testified that in 1978 the parties discussed the issue of notification to the Union as to changes in the plant. The Union wanted to be informed as to all employees laid off, transferred or recalled and anything that would affect their wages, hours or conditions of employment. It requested such notification of any change in advance so that it could be aware of how the change would affect the employee. A notification should be given as to all transfers lasting more than one day (Tr. 196-198).

The Company proposed to Mr. Smith that he designate someone at the plant with whom the Company could discuss daily transfers. Mr. Smith rejected this proposal stating that the employees in the plant were "not very well versed in Labor and Management Relations" and that it was best for the Union representatives to be contacted (Tr. 198-199).

The Company also proposed to implement the tentatively agreed to contract article on seniority which would have allowed them to transfer people for up to five days and to lay off within the departments. However, the Union refused to accept this proposal since it wanted a complete contract executed prior to implementing any clause (Tr. 199-200).

After these proposals were discussed and rejected, the Company agreed to notify the Union as often as they could on the matter of transfers. Mr. Smith then testified that during 1978 the Company did notify him about line layoffs but not about line transfers (Tr. 200-201).

Further testimony by Mr. Smith indicated he could not recall that he was notified concerning the shutdown of line 20 and a transfer of employees in April, 1978, the

shutdown of the first shift of the Series 1400 department from mid-April 1978, until early May 1978, or the shutdown of two second shift lines in the Series 800 department and transfer of employees which began around May 9, 1978 (Tr. 204).

With reference to a layoff on February 24, 1978, Mr. Smith testified on cross-examination that the Company notified him of it on February 25, 1978, by telegram. He stated that those employees should have been transferred within the plant in accord with the past practice of the Company rather than laid off (Tr. 305-306). On re-direct, Mr. Smith said that, in situations where there is a choice between laying off employees or transferring them, the Union prefers to have the employees transferred but not without prior notice to the Union (Tr. 372-373).

Mr. Jim Kuyrkendall, Croft plant manager, testified that there was a shutdown on Line 1 of Series 20 on April 14, 1978, which was a result of an inventory pile up in the warehouses. This he discussed with the Production Control and Purchasing Departments. The shutdown did not cause any layoff. He indicated that there would have been time to notify the Union in advance of this shutdown, but in the past he had never personally notified the Union on shutting down lines or anything else (Tr. 500-502). Also, he was never instructed to inform Mr. Jean Kuyrkendall, the vice president of finance, of a shutdown that would involve only the transfer of employees rather than layoffs (Tr. 504).

To the best of his knowledge, Mr. Kuyrkendall testified that there was no bargaining with the Union over the transfers necessitated by this line shutdown (Tr. 511).

When employees were transferred, Mr. Kuyrkendall stated that seniority was not considered, in the past or presently, but seniority was considered in layoffs. When

transfers were made, employees were probably not given a choice as to where they would be moved (Tr. 511-512).

Line 1 of Series 20 was still in shutdown status at the time of the hearing in June, 1979 (Tr. 513).

There was a shutdown of a line from mid-April to mid-May 1978, on the 1400 series. About 15 to 20 employees were affected by the shutdown. Mr. Kuyrkendall testified the reason for this shutdown was a shortage of brite dip material, but according to his earlier deposition, the shutdown was caused by warehouse levels (Tr. 534-535). The employees on the 1400 line were transferred to other areas and Mr. Kuyrkendall did not think that the Union had been notified in advance or given an opportunity to bargain about the shutdown. Employees were not asked their preferences for transfer (Tr. 536-537).

According to Mr. Kuyrkendall, in late April and in early May 1978, Lines 20 and 23 of the 800 series were shut down on the second shift. The reason for these shutdowns was excessive inventory. Some employees were transferred to the patio door line and some were put on the first shift. There was no bargaining with the Union prior to these shutdowns nor were employees given a choice of jobs or shifts in their transfers. Some employees who were transferred were doing different work than they had done before. As to both of these shutdowns, there would have been sufficient time to notify the Union in advance. These two lines were still in shutdown status at the time of the hearing (Tr. 538-543).

When examined by Company counsel, Mr. Kuyrkendall testified that shutdowns do not occur very frequently —perhaps only once a year (Tr. 980). Also, the need for a cut in production cannot be determined exactly until the preceding Friday when all of the orders are compiled (Tr. 984). An employee's wages and hours of work

are not affected when the worker is transferred from one department to another (Tr. 986). As long as Mr. Kuyrkendall has been with the Company, the method of transferring employees has been the same (Tr. 987).

Mr. Robert Brumfield, a line employee at Croft, testified that, after he returned from the strike, he was transferred from job to job (Tr. 626-627). Sometimes he was put on a job about which he knew nothing (Tr. 630). Brumfield testified that he was never given a choice of jobs when transferred nor was seniority followed (Tr. 631). Mr. Brumfield was not satisfied with the Company practice of transferring employees from job to job.

Ms. Callie Smith, another line employee at Croft, testified that she was transferred to several different jobs when she returned from the strike. She worked on a number of different lines and in the fabricating department and finally was given a job sweeping floors in the Series 20 department (Tr. 660, 663-665, 668).

Mr. Jean Kuyrkendall, when examined by Board counsel, testified that it was not Company policy to notify the Union about temporary or permanent employee transfers. He did notify the Union about shutdowns when employees were laid off (Tr. 768-770).

Prior to Union certification, he stated that the Company did not notify the Union of transfers or layoffs. At the request of the Union, after its certification as bargaining representative, the Company started to notify the Union of layoffs (Tr. 773). He further testified that Mr. Smith had requested in 1978 that the latter be notified of transfers but the Company did not comply. The Company believed that such notification could only be "after the fact" or, if given in advance, only as to a possibility of layoffs or transfers in several weeks due to inventory levels (Tr. 779-788).

Mr. Jean Kuyrkendall testified that the Company attempted to negotiate a system of notification on changes in the plant with Mr. Smith because of the Court Order in 1978. This last statement was inconsistent with Mr. Kuyrkendall's deposition, which was read into the record, wherein he stated there was no change in Company policy on transfers as a result of the Court Order (Tr. 790-792).

Further testimony by Mr. Kuyrkendall indicated that temporary transfers occur more frequently than line shutdowns and that layoffs cannot usually be determined until the Friday of the preceding week (Tr. 799, 803).

Mr. George C. Martin, a supervisor at Croft, testified that transferring employees on a temporary and permanent basis has been going on as long as he has been there—about nine years (Tr. 1014).

Mr. Otha Cothern, an area supervisor at Croft, testified that transfers are discussed with employees but the employees have never asked for transfers to specific areas. Loans of employees to other departments were always for less than a year; but, at the time the loan was first made, the length of the loan could not be estimated (Tr. 1109-1112).

DISCUSSION

Paragraph (1) of the Court Order provides that the Company shall "refrain from making unilateral changes in wages, hours and working conditions, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto." The shutting down of production lines and the transfer of employees is a change in terms and conditions of employment, *Oneita Knitting Mills, Inc. v. NLRB,* 375 F.2d 385, 389

(5th Cir. 1967), and paragraph (1) demands that such a change by the Company shall not be undertaken unilaterally. Prior to instituting such change, paragraph (1) requires the Company to give the bargaining representative of its employees notice and the opportunity to bargain as to the transfer. The requirement of notice in labor negotiations is well settled, *NLRB. v. Laney-Duke Storage and Warehouse,* 369 F.2d 859, 869 (5th Cir. 1966), and notice cannot be dispensed with even after the parties have reached an impasse. *Hartmann Luggage Co.,* 173 NLRB No. 193, 69 LRRM 1573, 1574 (1968).

The Company here admittedly did not notify the Union prior to the shutdown of production lines in the Series 20, Series 1400 and Series 800 departments in April and May of 1978. Nor did the Company give the Union an opportunity to bargain about the effect that the transfers resulting from the shutdowns would have on the employees' working conditions. The Company's failure to give notification to the Union of transfers is a violation not only of the Company's agreement with the Union to notify it of transfers but also of the Court Order.

It is no defense that the Company claims to have followed past practice by not notifying the Union on the matter of these shutdowns and the resulting transfer of employees. The Union's certification as the bargaining representative of the employees imposes upon the Company legal obligations which did not exist previously. The matter of employee transfers is a mandatory subject of bargaining. The Union made it clear to the Company that it wished to be notified of transfers and the Company agreed to comply with the Union's request. Further, the Court Order specifically directed the Company to notify and bargain with the Union in regard to changes affecting employees' conditions of employment.

It is also no defense that the Company could only notify the Union in advance that shutdowns and transfers were just possibilities rather than definitely slated to occur. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Court held that the Company was required to notify and bargain with the Union about the possibility of contracting out work. In addition, paragraph (1) of the Court Order expressly states that the Company is to give the Union adequate notice of "contemplated changes" and is to bargain in good faith with respect thereto. Thus, the mere possibility of a shutdown and the transfer of employees requires advance notice and bargaining with the Union. As to each of the line shutdowns here in issue, the Company admitted that it had knowledge, approximately three weeks in advance, that the shutdowns might occur.

The evidence in regard to the issue of employee transfers following the line shutdowns clearly shows that the Company violated paragraph (1) of the Court Order by failing to give notice and bargain with the Union prior to implementing the changes.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. In 1978 the Union requested the Company provide it with notification in advance of all employee transfers and layoffs.

2. The Company agreed to notify the Union as often as possible as to transfers.

3. The Union was not notified in advance of the transfers resulting from the shutdown of Line 20 in April 1978, the shutdown of the first shift of the Series 1400

department in April 1978, and the shutdown of two second shift lines in the Series 800 department in May 1978.

4. The line shutdowns occurred because of excessive inventory levels in the warehouse.

5. The Company had adequate time to notify the Union in advance that there was a possibility of line shutdowns which would result in employee transfers.

6. Employee seniority is not considered by the Company when temporary or permanent transfers are made within the plant.

7. There is employee dissatisfaction with the Company's methods of transferring employees.

8. The transfer of employees is a change in terms and conditions of employment, and the Company is required to give the Union notice and an opportunity to bargain prior to making such change. Notice to the Union is required even when the transfer of employees is only a possibility.

CONCLUSION OF LAW

The Company violated paragraph (1) of the Court Order of January 13, 1978, by failing to notify the Union prior to transferring employees in April and May 1978.

IV

The Board alleges that the Company has violated the Court Order which requires it to rescind, upon request, the merit evaluation system it unilaterally implemented in November 1976.

According to testimony of Mr. Smith and the bargaining session transcripts, on January 6, 1978, during the first

bargaining session between the Company and the Union, the Company agreed to comply with the Court Order as to reinstitution of the former merit evaluation system. The Union requested that the Company rescind the new evaluation form, restore use of the old forms, and provide the Union with copies of those old forms (Tr. 152-153; Joint Exhibit 2-A, pp. 15-16).

On January 13, 1978, the Company asked the Union to review the new forms and make counter-proposals or recommendations for its use. The Company stated then that it had not rescinded use of the new forms primarily because they provided for greater employee input as to their evaluations. The Union agreed to take the new forms under consideration (Tr. 157; Joint Exhibit 2-B, pp. 4-6). On the following day, the Union presented a package proposal which would replace merit increases with an automatic progression schedule for pay increases. With automatic progression there would be no need for evaluation forms (Joint Exhibit 2-B, pp. 117-118).

The package proposal was rejected by the Company on January 19, 1978 (Joint Exhibit 2-C, p. 19). At the session on the following day, the Company proposed to eliminate the use of all forms and to institute a system of oral evaluations. The Union rejected this proposal and renewed its demand that the Company return to using the old forms (Tr. 158; Joint Exhibit 2-C, p. 87).

At the meeting on January 26, 1978, the Company told the Union that they had eliminated the evaluation forms (Joint Exhibit 2-D, p. 2). The Company then presented a package which included a proposal that all evaluations be done orally. The Union offered to accept oral evaluations if a shop steward could be present at the evaluation meeting between the supervisor and the employee. However, the Company would not agree to the presence of

shop stewards. Therefore, the Union rejected oral evaluations and requested that the new evaluation form be rescinded in accordance with the Court Order (Joint Exhibit 2-D, pp. 20, 121-123; Board Exhibit 16; Joint Exhibit 2-E, pp. 23-24, 56).

On February 9 the Company again proposed that the new forms be used in evaluations. Once again the Union agreed to consider the proposal (Joint Exhibit 2-F, pp. 34-35).

During the bargaining session on February 16, the Company told the Union that the new evaluation forms had been rescinded and that evaluations were being done verbally. The Union's position was that this was a unilateral change by the Company since oral evaluations had only been proposed and never agreed upon. The Company then asserted that oral evaluations had been negotiated with the Union. The Union denied that it had been negotiated since oral evaluations had merely been proposed (Tr. 345-346; Joint Exhibit 2-G, pp. 13-15).

On February 23, 1978, the Union renewed its request, pursuant to the Court Order, that the Company reinstate use of the old forms. The Company agreed to comply with the request and the Union indicated it would negotiate as to merit evaluations once the Company acted on the request (Tr. 158; Joint Exhibit 2-I, pp. 14-15, 21-22).

At the February 24 bargaining session, the Company told the Union that it wanted to reach an agreement on merit evaluation forms. The Union objected to the new forms because they required leadperson participation in the evaluation process, which process the Union believed to be supervisory in nature (Tr. 160; Joint Exhibit 2-J, pp. 191-194).

After further bargaining the parties reached agreement on a new written employee evaluation on March 9, 1978. The agreement was that, under the heading "Instructions," the leadperson's name would be deleted and "Last Date Evaluated" would be added under "Evaluation Date." The anticipated effect of the deletion was to eliminate the leadperson's participation in the evaluation (Tr. 159-160). The Company told the Union it wished to implement this new system immediately to ensure that employees would get the merit increases to which they were entitled. The Union consented to the change being made as soon as practicable. The Company was to print up the new forms and, until they were ready for use, the old or "pink" form (Exhibit B-5) was to be used (Tr. 159-162).

After this agreement the Union informed Company employees that the merit evaluation system had been changed. Later, however, employees reported to Mr. Smith that they were not receiving copies of their evaluations as they were supposed to (Tr. 163). This was reported to the Board so the Board contacted the Company concerning the status of merit evaluations. The Company responded that the agreed upon system had not been put into effect because of the Union's past position against "piecemealing" the contract (Board Exhibit 41).

The next communication from the Company to Mr. Smith in regard to the forms was a letter from Mr. Jean Kuyrkendall in June 1978, in which the new form was enclosed. Mr. Smith testified, however, that this form was not in accordance with the agreement reached and he so informed the Company. The form still contained the word "leadperson" under "Instructions" on the top of the page. This indicated to Mr. Smith that the leadperson was still to be involved in the valuation process (Tr. 164-168).

A second "new" form was sent to Mr. Smith with a letter from Mr. Jean Kuyrkendall dated July 18, 1978. This second form was different from the first one and, according to Mr. Smith, it met the requirements of the agreement reached on March 9, 1978 (Tr. 170-172; Exhibit B-12).

Mr. Smith then testified that, to his knowledge, the second "new" form was put into effect at the plant after he received it in July 1978 (Tr. 172-173).

Upon cross-examination by Company counsel, Mr. Smith was asked to and did read the transcript of a bargaining session on March 9, 1978. The reading of the transcripts and reference to a letter from Mr. Smith to Mr. Kuyrkendall on June 17, 1978 (Exhibit B-9), combined with an examination of the evaluation forms elicited an admission from Mr. Smith that the Company narrowly followed his requests concerning the evaluation forms. [That is, each specific request made by Mr. Smith, as to a wording change on the form, was complied with by the Company, but the Union's general request to eliminate all lead-person participation in the evaluation process was not complied with.] (Tr. 346-349).

Mr. Jean Kuyrkendall explained the delay in implementing the forms apparently agreed upon on March 9, 1978, was due to an oversight. He testified that he arranged for the printing of the forms and requested that the person in charge of printing the forms notify him as soon as they were ready. This was not done and he did not inquire about the forms until the matter was brought to his attention in May by Mr. Yelverton Cowherd, one of the Company's counsel at the bargaining sessions (Tr. 1170-1171). Thereafter, that form was forwarded to Mr. Smith for approval but the latter returned it for the modifications which he indicated were necessary in order for it to meet the requirements of the agreement of March 9, 1978.

DISCUSSION

The Court Order directs that the Company shall, upon the Union's request, rescind the merit performance evaluation system which it unilaterally instituted in November 1976, and, if requested by the Union, bargain with the Union regarding a merit wage adjustment system for the employees in the unit.

This order demands rescission of the system implemented in November 1976, but it does not expressly require that the Company reinstate any former system of merit evaluation. The Union and the Board apparently interpreted the order as requiring reinstitution of the former system, as well as rescission of the new system. In *NLRB v. Kohler Company,* 351 F.2d 798, 806 (D.C. Cir. 1965), the court stated that great weight should be given to the meaning the Board places on a court decree in contempt proceedings.

The Union requested rescission of the new system a number of times, and also demanded a return to the old system. The Company, on at least two occasions, agreed to rescind the new system and to go back to using the old evaluation forms. However, the Company never did, in fact, reinstate use of the old forms. Instead, it went to a system of oral evaluations. An oral evaluation system had been presented to the Union as a Company proposal during bargaining, but the Union had rejected it. The Company instituted this oral system without notification to the Union. Under § 8(a)(5) of the Act (NLRB), an employer is not permitted to implement unilateral changes in working conditions, even where the change results in improved working conditions, since the Union's effectiveness as a bargaining representative is undermined by such action. *United Steelworkers of America v. NLRB,* 390 F.2d 846,

850 (D.C. Cir. 1968). Thus, the Company's use of oral evaluations was a prohibited unilateral change.

Further negotiations between the parties on merit evaluations did finally result in an agreement on March 9, 1978. The agreement provided that a revised form of the Company's most recent evaluation forms be put into as soon as they could be printed. The revised form was not sent to the Union until June 7, 1978, and the evidence relating to the reason for this three-month delay is conflicting. It was stated to be an intentional action in an attempt not to piecemeal the contract as well as an unintentional oversight. The specific reasons for the Company's failure to promptly abide by the March 9, 1978, agreement to implement the forms are not, however, of importance here. In a proceeding for civil contempt, the question is whether the respondent did, in fact, fail to comply with the decree and not whether the failure was unintentional or in bad faith. *O. C. & Atomic Workers International Union, AFL-CIO v. NLRB,* 547 F.2d 575, 581 (D. C. Cir. 1976).

The evidence establishes that the Company violated paragraphs (d) and (1) of the Court Order in regard to the merit evaluation system when it did not implement the January 6 agreement to rescind the use of the new form and reinstate the old form. In addition, the Company unilaterally instituted a system of oral evaluations, which it conducted up until August 1978, at which time it finally complied with the March 9, 1978, agreement.

Based on the evidence, I reach the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 6, 1978, the Company, at the Union's request, agreed to reinstate the former merit evaluation system.

2. On January 13, 1978, the Company told the Union that it had not rescinded use of the new forms and asked the Union to review the new forms and make counter proposals or recommendations for its use.

3. On January 14, 1978, the Union presented a package proposal which included an automatic progression schedule for pay increases to replace merit increases. The Company rejected the proposal.

4. On January 20, 1978, the Company proposed to eliminate the use of all forms and to institute a system of oral evaluations. The Union rejected this proposal.

5. On January 26, 1978, the Company told the Union that evaluation forms had been eliminated. The Company then proposed oral evaluations which were again rejected.

6. On February 16, 1978, the Company told the Union that evaluations were being done verbally. The Union claimed that this was a unilateral change by the Company.

7. On February 23, 1978, the Union requested that the old forms be used. The Company agreed to comply with that request.

8. On March 9, 1978, the parties reached agreement on new written evaluation forms. The Union's understanding of this agreement was that there was to be no lead-person participation required in the evaluation process.

9. The agreed upon system of evaluations was not in effect by May and, upon inquiry, the Company stated that the reason for the delay was the Union's past position against piecemealing the contract.

10. In June 1978, the Company sent a new form to the Union for approval. This form did not show that participation by leadpersons had been effectively eliminated from the evaluation process.

11. On June 18, 1978, a second new form was sent to the Union. This form indicated that no leadperson participation would be required and thus met the Union's interpretation of the March 9, 1978, agreement.

12. The Company's use of oral evaluations was a prohibited unilateral change.

CONCLUSIONS OF LAW

1. In failing to rescind use of the new forms and reinstate the old forms in January 1978, the Company violated paragraph (d) of the Court Order of January 13, 1978.

2. By instituting a system of oral evaluations in February 1978 the Company violated paragraph (l) of the Court Order of January 13, 1978.

V

The Board alleges the Company has violated the Court Order by failing and refusing to meet with the Union for bargaining after March 10, 1978, although a bona fide impasse had not been reached.

Mr. Smith, Union representative and chief negotiator, testified that the bargaining session on March 10, 1978, was the last meeting between the parties. The Company told the Union, at that time, that it was useless to meet any longer and they would not meet with the Union until the Company was notified by mail that the Union would change its position and drop its demands on certain things

that were still on the table. Mr. Smith believed that setting such a condition was in violation of the Ground Rules which required the parties to meet Thursday and Friday of each week. The Union was willing to go on meeting weekly. And, in fact, Mr. Smith was in McComb the following week for the meeting, but the Company did not show up. When the sessions thus ended, agreement on a contract had not yet been reached (Tr. 205-207).

In Mr. Smith's opinion, a bargaining impasse in the negotiations had not been reached (Tr. 208). According to Mr. Smith, there were still a number of open issues such as job classifications, bonuses and wage proposals. As to wage proposals, the Union had accepted the Company's proposal but with one addition—that merit increases were to be subject to arbitration. The Company would agree to submitting merit increases to the grievance procedure but not to arbitration (Tr. 208-212).

Mr. Smith testified that, after March 10, 1978, he thought it would be useful for the parties to continue on in their discussions because there was still a possibility of reaching an agreement. The Union was willing to consider other types of modifications to its proposals (Tr. 216). Mr. Smith stated that he did write to Mr. Cowherd and Mr. Jean Kuyrkendall to tell them that there were still issues about which the parties could negotiate (Tr. 220-223; Board Exhibits 18, 19).

After the meeting on March 10, 1978, the parties met in May 1978 to discuss the layoff of a group of employees. No other discussions were held at that meeting (Tr. 224-225).

On cross-examination, Mr. Smith testified that, had the Company agreed to submit merit increases to arbitration on the Union's proposal of March 10, 1978, the parties would then have reached an agreement (Tr. 293).

Further testimony by Mr. Smith on cross-examination was to the effect that, when the Company questioned Mr. Smith on what was going to be discussed at future meetings, his response was the Company would be "hearing the same questions about what they had done to rescind and what they had done to reinstate." Mr. Cowherd's response at that time had been that he was "not going to come down from Memphis to hear it all over again" (Tr. 307-308, 312-313; Joint Exhibit 2-L).

The Union sent several letters to the Company to request meetings for discussion of the open issues after March 10, 1978, but did not set forth any new proposals in those letters or suggest that the Union wished to present any new proposals (Tr. 314-315).

During the period following the cessation of negotiations the Company did notify Mr. Smith of a number of pending layoffs. Mr. Smith admitted that there were a number of these letters to which he did not respond or in regard to which he did not request bargaining as to the matters contained therein (Tr. 331-335).

On behalf of the Company, Mr. Jean Kuyrkendall testified that, on March 10, 1978, the parties were divided over whether merit increases should be subject to arbitration. The parties were then in accord on all other proposals. He stated that, if the Company had accepted the Union's proposal to submit merit increases to arbitration, then a contract would have been concluded. The Company refused, however, to accept that proposal (Tr. 1191-1193).

Mr. Kuyrkendall's further testimony on this issue was that:

> "On March 10, 1978, in trying to schedule future negotiations, we had come down to the point that we

were one word apart, and in talking about future negotiations we asked Mr. Smith if he would change his position, or if he would continue to come in and review the Court Settlement Order, and we asked that he put that in writing to us, or call us, and let us know that he was going to change his position and had something different to propose and we would be agreeable to meet with him, and to the best of my knowledge, we were never informed by Mr. Smith that he intended to change.

"He said that if we in fact did meet that we would hear basically the same thing that we had been hearing, and that would be, for example, what have you done to rescind Paragraph C of the Settlement Order . . . ." (Tr. 1195).

DISCUSSION

A major issue presented by the Board is whether a bargaining impasse was reached between the Company and the Union on March 10, 1978. " 'Impasse' within the meaning of the federal labor laws presuppose a reasonable effort at good faith bargaining which, despite noble intentions, does not conclude in an agreement between the parties." *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 48 (5th Cir. 1974). And, an impasse exists only when all bargaining possibilities have been exhausted and further meetings would be fruitless. *NLRB v. Dell*, 283 F.2d 733, 740 (5th Cir. 1960).

The evidence in this case shows that, prior to the 1978 bargaining sessions, approximately thirty (30) contract articles had been tentatively agreed upon and reduced to writing (Respondent's exhibit 17). In January 1978, the Company presented what it termed to be a final package proposal concerning the eight issues still open between the

parties. This propsal was later opened by the Company for item by item discussion rather than an "all or nothing" acceptance by the Union. At the last contract bargaining session on March 10, 1 78, the Union agreed to accept each item contained in the Company's package with the exception that merit increases be subject to arbitration as well as to the previously negotiated grievance procedure. The Company, however, refused to agree to this one counter proposal.

A reasonable effort at good faith bargaining by the Company is evidenced by the 30 articles negotiated and agreed to prior to 1978, and the presentation of their package proposal in January 1978, later offered as eight individual Company proposals on the open issues. The mere fact that the Company refused to accept the Union's proposal to submit merit increases to arbitration is not evidence of bad faith. An employer does not contravene statutory requirements by adamantly insisting on a bargaining position. *NLRB v. Big Three Industries, Inc., supra* at 47. Thus it appears that the Company did, indeed, bargain in good faith with the Union.

Both parties agree that, had the Company accepted the Union's proposal on arbitration of merit increases on March 10, 1978, an agreement would have been reached (Tr. 293, 1191-1193). But neither party was willing to concede on the matter of arbitration.

Once this point was reached in the negotiations, the Company asked the Union what they planned to discuss at future sessions. Mr. Smith, the chief Union negotiator, responded that the Company would be hearing the same questions about what they had done to rescind or to reinstate certain policies. The Company's representative, Mr. Cowherd, then indicated that it would be futile to meet to go over those same things, and that they would

not attend a meeting until the Union notified the Company that its position had changed (Tr. 307-308, 312-313; Joint Exhibit 2-L).

Based upon an evaluation of the evidence, I conclude that negotiations between the Company and the Union had reached a bona fide impasse on March 10, 1978. It appears that all bargaining possibilities had been exhausted and further meetings between the parties would have been fruitless. *NLRB v. Dell,* 283 F.2d 733, 740 (5th Cir. 1960).

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. On March 10, 1978, the parties held their final bargaining session to negotiate the terms of the contract. No agreement was reached.

2. On March 10, 1978, the parties were divided over whether merit increases should be subject to arbitration. Agreement would have been reached if the Company had agreed to submit merit increases to arbitration.

3. Until negotiations ceased on March 10, 1978, both parties had bargained in good faith. After March 10, 1978, further meetings would have been fruitless.

4. A bona fide impasse in negotiations was reached on March 10, 1978.

CONCLUSION OF LAW

The Court Order of January 13, 1978, was not violated since the Company and the Union reached a bona fide impasse in negotiations on March 10, 1978.

VI

The Board alleges that on or about February 9, 1978, and continuously thereafter during the negotiations, the Company took the position that it would not bargain over job classifications. In addition, the Board alleges that on or about February 16, 1978, and continuously thereafter during negotiations the Company failed and refused to supply to the Union requested information which would explain the basis for the Company's job classification proposal, even though said information was relevant to negotiations and necessary to enable the Union to formulate its own job classification proposals. Also, that the Company, after it had represented to the Union that only two former supervisory employees had sufficient knowledge to explain the Company's job classification proposal, failed and refused to make those persons available at the negotiations, although requested to do so by the Union. Since these issues must be resolved on essentially the same facts, they will be discussed together.

In support of the Board's allegations, Mr. Smith, the chief negotiator and representative of the Union, testified that he had experience in job evaluation studies and holds a certificate from the University of Wisconsin in Time Study and Job Evaluation. He stated that the Company was aware of his qualifications and he informed the Company he wanted to discuss the specifics of job classifications. He said that it was important for him to see the original evaluation sheets, which were the basis for a final job classification proposal, in order to determine whether the various elements of the job considered in the evaluation were appropriate (Tr. 181-183).

Mr. Smith testified that in 1978 the Company and the Union discussed job classifications. Mr. Smith stated that he asked the Company for the evaluation sheets so that

he could ascertain how jobs had been slotted. The Company responded that the sheets were at the plant but had been lost. In the event they were found they would be given to the Union. Mr. Smith did testify that the sheets were in fact given to him within approximately 30 days (Tr. 186).

According to Mr. Smith, the evaluation sheets received from the Company were not useful to him because he could not "ascertain whether or not they were true and correct" (Tr. 188). He then requested an explanation of the sheets from the Company. The Company negotiators told him "that they did not prepare it. They knew nothing about it and they stood upon their proposal" (Tr. 188). Upon asking who had prepared the evaluations, Mr. Smith stated that he was told that Mr. Bobby Bellipanni, the former Personnel Director, and Mr. Dias, who had been the Industrial Engineer, had done them. Neither of these two men were still with the Company, but the Company negotiators told Mr. Smith that if the Union wanted them, they would get their names and addresses and give that information to the Union so that the Union could talk to them. According to Mr. Smith, the Company was not willing to bring these people into the bargaining session (Tr. 188-189). Following this Mr. Smith said that in lieu of bringing in Mr. Dias and Mr. Bellipanni, he requested that the Company bring in someone who was going to administer the job evaluation system or who could explain it so that the Union could understand it and know how it was going to work. Mr. Smith said that had this second request been complied with, it would have been satisfactory to the Union, even if such person could not describe everything in detail. But the Company refused to do this (Tr. 189-190). Mr. Smith stated that he also offered to go down to the plant and do the study himself. The Company refused this request because they already had done it and did not see any need for wasting time (Tr. 191).

Mr. Smith went on to say that he made a further proposal to bring in an Industrial Engineer, costs to be split between the Union and the Company, so that the parties could be guided by the Industrial Engineer's findings. The Company did not accept this proposal (Tr. 191).

Mr. Smith testified that he had doubts about the Company's job evaluation proposal, as presented to him, and he so informed the Company. However, the Company refused to bargain over the method of slotting jobs in their job classification proposal (Tr. 191-193).

Further testimony by Mr. Smith indicated that the Union also made proposals to the Company concerning job classifications during 1978. Mr. Smith was not fully satisfied with the Union proposals, but he stated that they were made in an effort to reach agreement with the Company. The Union even used the Company's own job classification proposals in making a proposal to the Company (Tr. 194-195).

The Board's examination of Mr. Jean Kuyrkendall showed that the Company presented its complete proposal on job classifications on October 7, 1976, and that at subsequent bargaining sessions the Union challenged a number of slotting decisions contained in the proposal. When questioned as to whether the people who prepared the evaluation may have made errors in judgment, Mr. Kuyrkendall stated that he thought it was possible (Tr. 1317-1321).

Mr. Kuyrkendall testified that in 1978 the Union may have said that it would accept the Company's job classification scheme, even though it was not totally satisfactory, for the purpose of reaching an agreement. He recalled that the Union proposed doing their own study and that they had requested an explanation of the Company's exaluation (Tr. 1326-1327). Mr. Kuyrkendall also stated he knew that the job evaluation sheets given to the Union

required an explanation as to how they had been compiled. He indicated that he was capable of explaining most of the classifications, but he could not explain the individual evaluator's judgment or thought process in each area (Tr. 1327-1329).

According to Mr. Kuyrkendall, the Company could have brought in one of their staff industrial engineers to discuss the classification proposal, and that such engineer could have given his personal opinion on the evaluation. The Company did not do that because they did not want to be discussing two Croft evaluations and had full faith in the evaluation prepared by Mr. Dias (Tr. 1332-1336).

Further testimony by Mr. Kuyrkendall showed that in February 1978 the Company told the Union it would not bargain or negotiate over how particular jobs were slotted in the job classification proposal. Mr. Kuyrkendall's explanation for this refusal was that the Company believed that sufficient time had been granted for discussion; that the Company was firm in its classification; that the information being sought by the Union had been available earlier; and that, in fact, Mr. Dias and Mr. Bellipanni had been with the Company at the time the proposals had been made, yet the Union did not attempt to discuss the evaluations with them then (Tr. 1336-1338).

On direct examination by counsel for the Company, Mr. Kuyrkendall testified that in 1976 the Company offered to allow Mr. Smith to do a job evaluation study. However, Mr. Smith did not conduct any evaluation. In 1977 the Union did not ever make a request to do a job evaluation study but did make such a request in 1978 (Tr. 1206-1207).

In early 1978 Mr. Smith asked that Mr. Dias be brought to the bargaining table at Company expense (Tr. 1210).

Mr. Kuyrkendall stated that until 1978 he had no indication that the Union objected to the Company's job classifications. This, he indicated, was borne out by Respondent's Exhibits R-20, R-21 and R-22 (Tr. 1210-1211).

DISCUSSION

Paragraph (k) of the Court Order requires the Company to refrain from refusing to bargain in good faith with the Union. The Board contends that the Company would not bargain over job classifications.

A party may bargain in good faith to impasse even where the subject of the dispute is a mandatory subject of bargaining. Thus, an employer's adamant insistence on a bargaining position does not necessarily indicate a refusal to bargain in good faith. *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 731 (1964). The Company here submitted a job classification proposal to the Union which had been prepared by the Company's personnel director and an industrial engineer. The Company had complete faith in the work of these two individuals and sincerely relied on the job classification scheme which was the result of their efforts.

The Company did discuss the proposal with the Union but did remain firm in its position on the proposal. The fact that the Company did maintain such a firm position is not evidence of bad faith. Further, there is no evidence that the Company insisted on its proposal for the purpose of frustrating agreement with the Union.

An evaluation of the evidence on this issue leads me to conclude that the Company did not refuse to bargain in good faith on job classifications and thus paragraph (k) of the Court Order has not been violated.

The Court Order provides, in paragraph (i), that the Company shall furnish to the Union upon its request, at reasonable times and places, and as promptly as circumstances permit, all relevant information necessary for it to properly carry out its function as the bargaining representative of the Company's employees. The Board contends that this paragraph was violated when the Company refused to make available at negotiations two former supervisory employees who had prepared the Company's job classification proposals.

Paragraph (i) orders the Company to comply with the firmly established duty of an employer to provide relevant information to Union representatives so that they can bargain effectively. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). This duty has been interpreted to require the employer to make available to the Union relevant data or information which is in the Company's possession, *Taylor Forge & Pipe Works v. NLRB*, 234 F.2d 227, 230 (7th Cir. 1956), or exclusive control, *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 721 (2nd Cir. 1966). The evidence shows that, upon the Union's request in 1978, the Company provided the Union with all the job classification data material that it had in its possession. This data consisted of evaluation sheets of each job classified. These sheets listed the point values assigned for each factor, as for example, education and experience, considered in the job evaluation. There is no indication in the record that the Company had within its possession any other document or information which would reflect the mental processes of the evaluators in reaching their determination as to point values. Thus, the Company clearly furnished all relevant information within its possession.

The Company's refusal to bring Mr. Bellipanni and Mr. Dias to the bargaining table, under the circumstances,

was not unreasonable. Neither Mr. Bellipanni nor Mr. Dias were employed by the Company in 1978, and, therefore, were not within the exclusive control of the Company. Further, even if the Company had requested their presence during negotiations, neither Mr. Bellipanni nor Mr. Dias could have been compelled to attend, nor to explain their thought processes in compiling the job classification proposal. Considering the foregoing, these individuals were not within the Company's control and the Company did not violate paragraph (i) of the Court Order requiring it to furnish information relevant to the job classifications.

Based on the evidence, I reach the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. A party may bargain in good faith to impasse even where the subject of the dispute is a mandatory subject of bargaining.

2. The Company had complete faith in the work of the individuals who prepared its job classification proposal and sincerely maintained a firm position on that proposal.

3. The firm position taken by the Company is not evidence of bad faith and there is no evidence that the Company maintained its position to frustrate agreement with the Union.

4. The Union requested the Company to provide the original evaluation sheets, which were the basis of the Company's final job classification, and the Company complied with that request.

5. The Company was able to explain most of the job classifications but was not able to explain the individual

evaluator's judgment or thought processes as to each classification.

6. The job classifications were formulated by two former Company employees who were no longer within the Company's control.

7. The Union did make proposals to the Company concerning job classifications in 1978.

8. The Company furnished to the Union all relevant information within its possession and control on its job classification proposal.

CONCLUSIONS OF LAW

1. The Company did not refuse to bargain in good faith in respect to job classifications and thus did not violate paragraph (k) of the Court Order of January 13, 1978.

2. The Company provided the Union with all relevant information within its possession and control and did not violate paragraph (i) of the Court Order of January 13, 1978.

VII

The Board charges that since January 1978 the Company has failed to pay returning strikers a rate which would reflect inclusion of the merit increases they would have received but for their participation in the strike. By failing to credit the former strikers with such increases, upon reinstatement following cessation of the strike, the Board alleges that the Company has failed to accord them rights to which unfair labor practice strikers are entitled, and has violated paragraph (j) of the Order.

The Board examined Mr. Jean Kuyrkendall on Company policy as to merit increases in an attempt to establish that all strikers should have been accorded merit increases upon their return to work in 1978. Mr. Kuyrkendall testified that he did not know how likely it was that an employee, after his first year of employment, would receive a merit increase every six months. He indicated that it was difficult to judge how easy it was for an employee to receive merit increases (Tr. 765-766).

The Board then produced Mr. Kuyrkendall's deposition and referred him to one of his responses, wherein he stated: "I really don't think it's difficult to receive a merit increase in our plant" (Tr. 766). He further deposed that in due course an employee should receive approximately two increases a year. Mr. Kuyrkendall then testified that it was his opinion that employees do regularly receive increases (Tr. 767).

The Board produced statistics, compiled from information furnished by the Company, which showed that, of 468 employees who worked from January 1, 1977, to December 31, 1977, 465 received at least one merit increase during that period and 315 received two or more merit increases. The minimum and most common merit increase was ten cents ($.10) (Board Exhibit 56, Appendix A).

Upon examination by counsel for the Company, Mr. Kuyrkendall testified that, if a person is not present in the plant, there is no way to evaluate him (Tr. 794). No evaluation form for an increase has ever been submitted for employees on leaves of absence, vacation or on sick leave (Tr. 795). Mr. Kuyrkendall indicated that, when supervisors filled out merit evaluation forms, they looked to work performance specifically dealing with quantity of work, quality of work, initiative, cooperation and atten-

dance (Tr. 795). He testified that it would not have been possible to give a striker, somebody who was not working, a merit increase without evaluating him (Tr. 795).

Mr. Kuyrkendall stated that it was his belief that strikers, who returned to work in January 1978, were treated fairly in consideration to merit increases, and that they eventually did receive merit increases in 1978 based on evaluations. Also, he had not noticed that as a group, the employee strikers were worse employees, in terms of performance, than the employees who did not go on strike (Tr. 814).

The Company's position on this matter was additionally supported by testimony of Mr. Jim Kuyrkendall, the plant manager, who stated he did not recall that the strikers, after they returned to work, received any different treatment than any other employee (Tr. 890).

Mr. Lynn Casey, a plant supervisor, testified that, to his knowledge, there has been no discrimination against the strikers. They were no more or less qualified than other employees nor more or less likely to receive increases than other employees (Tr. 1136).

Later in the hearing, upon recall by Company counsel, Mr. Jean Kuyrkendall stated that the Union asserted that returning strikers should get the merit increases that would have been granted had they been in the plant (Tr. 1224-1225). The Company's response to the Union's position was "that merit increases were in fact based on merit, and that you had to be present to be evaluated to in fact receive a merit increase" (Tr. 1225). Strikers did not lose any benefits such as seniority, holidays and vacation time (Tr. 1225-1226).

DISCUSSION

The law in regard to unfair labor practice strikers provides that such strikers are entitled, upon reinstatement, to the rights and benefits that they would have had but for the unfair labor practice which resulted in the strike. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 197 (1941). And, in *Trinity Valley Iron and Steel Co. v. NLRB*, 410 F.2d 1161, 1772-1173 (5th Cir. 1969), it was determined that the rights of reinstated unfair labor practice strikers included the right to receive any merit increases that they would have earned but for the strike. In order to determine whether the increases would have been earned, the record of increases given to non-striking workers during the strike period must be examined. Where increases are given with a high degree of regularity, the conclusion is justified "that the striking employees would have received them absent unusual or special circumstances." *Trinity Valley, supra* at 1172. In *Trinity Valley*, a finding that more than 90 percent of the working employees received increases was sufficient for the court to hold that the strikers should have received them on reinstatement. As to non-striking Croft employees, the evidence shows that more than 99 percent received at least one increase of ten cents or more during 1977.

Once it is shown that such increases are granted with a high degree of regularity, the burden is then on the employer to prove that a striker, otherwise eligible, would not have received the increase "because of unusual or special circumstances." *Trinity Valley*, at 1173. In the present case, the Company has not shown that such circumstances existed. In fact, Company witnesses indicated that there was no difference in the work performance of the employees who had been on strike and the employees who worked throughout 1977.

The court, in *Trinity Valley*, found further that the employer's characterization of increases as being based on merit alone is not sufficient to show "unusual or special circumstances" which would warrant a denial of the increase to any striker. 410 F.2d at 1161. Thus, Croft's reliance on their assertion that all increases granted to imployees are based on merit is no defense to their refusal to give returning strikers an increase in their hourly wage.

The granting of merit increases to employees upon their return to work would not have been "backpay," for the returning strikers would not have received any money for the period during which they did not work. Rather, the increase would merely have restored the strikers to the position which they would have occupied but for the strike. Merit increases are now a matter of backpay since they were not put into effect upon the strikers' reinstatement in January 1978.

In this case a ten cent merit increase for each returning striker seems appropriate. During 1977 almost every employee received one increase of at least ten cents. Increases above ten cents were not given with any regularity. An increase of more than ten cents would indicate that such amount was actually based on merit and thus an employee would have had to have been present in 1977 in order to be evaluated for such increase.

Thus, it is clear that the Company has violated paragraph (j) of the Court Order by refusing to grant merit increases to the strikers upon their reinstatement. It is my recommendation that the Company grant one ten cent merit increase to each striker who was reinstated in 1978 and make whole each of those employees by paying the amount that would have been received had the increase gone into effect immediately upon reinstatement.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. Strikers who returned to work in 1978 were not credited with any merit increases in their rates of pay.

2. Over 99 percent of the employees who worked during the period of the strike in 1977 received at least one merit increase of a minimum of ten cents.

3. Absent unusual or special circumstances, reinstated unfair labor practice strikers are entitled to receive any merit increases that they would have earned but for the strike. The Company has not shown any unusual or special circumstances in this case to warrant a denial of merit increases.

4. The granting of merit increases to employees upon their return to work would not have been backpay.

5. An increase of more than ten cents or more than one increase during 1977 indicates an increase actually based on the merit evaluation for which an employee would have to be present.

6. The employees who were on strike are entitled to a ten cent ($.10) merit increase in their hourly wage since their return to work.

CONCLUSION OF LAW

The Company violated paragraph (j) of the Court Order by refusing to grant merit increases to strikers upon their reinstatement.

VIII

On the issue as to whether Company employees should be paid for the July Fourth holiday in 1978, the parties

have stipulated that the day of July Fourth is a paid holiday for the Company's employees and has been since 1971. With exception of the birthday holiday granted individual employees prior to 1977, there are not, and have not been, in the same period any other paid holidays in July (Joint Exhibit 1, item 7).

Mr. Smith, Union representative and chief negotiator for the Union, testified that, in the past, employees had been required to work on the Saturday before a holiday when they would be given an additional day off in connection with the holiday. In 1978 the employees did not work on Saturday, June 30, but were given July 3 off and only paid for the July 4 holiday. Thus, the employees were only paid for four days. The Union contended that the employees should have been paid for Monday, July 3, when the plant was shut down or given Saturday work so that they could make a full week (Tr. 230-232). The Union regarded the Company action as a change and informed the Company of its position by letter (Tr. 232-233; Board Exhibit 22). According to Mr. Smith, the Company's response to the Union was that they were going by past practice and were nct willing to pay the employees for that day as requested by the Union (Tr. 233-234; Board Exhibit 23).

Mr. Roddie Varnado, a leadman at Croft, testified that he was paid for the July Fourth holiday but not for the Monday preceding it when the plant was shut down. He testified that this was different than in the past. Previously the employees worked the Saturday before the holiday in order to be paid (Tr. 700-701). This same situation would occur at Thanksgiving when the employees would work the Saturday before the holiday in order to have the Friday following Thansgiving off (Tr. 702). The parties stipulated that the Thanksgiving practice changed

in 1977. Now employees receive Thanksgiving Day and the Friday following it as paid holidays (Tr. 703).

In support of Mr. Varnado's testimony, his check stubs for the weeks of July 7, 1978, November 26, 1976, November 28, 1975, November 29, 1974, November 23, 1973, and July 7 1972, were offered into evidence and admitted (Tr. 705-710; Board Exhibits 50-A-50-G). His stub for July 7, 1972, the only other week during this period when July 4 fell on a Tuesday, shows that Mr. Varnado worked 34 regular hours and received 8 hours of holiday pay (Board Exhibit 50-F).

Mr. Jim Kuyrkendall, the plant manager at Croft, testified that, when July Fourth fell on a Tuesday, it was Company practice to work on the preceding Monday if production was needed. If production was not needed, they did not work (Tr. 550). Mr. Kuyrkendall testified that, when the Fourth of July falls on a Tuesday or Thursday, it was Company practice to be open on the preceding Saturday only if production was needed (Tr. 562-564).

With respect to the Fourth of July situation, Mr. Kuyrkendall testified that he did not inform the Union ahead of time that it was the Company's intention not to be open for production on the Saturday preceding. Further, he did not know whether anybody else in the Company notified the Union and gave them an opportunity to bargain about that subject. He did indicate, however, that there would have been sufficient time to inform the Union (Tr. 564-565).

Production reports indicate that throughout 1978 there was only minimal production on occasional Saturdays in some areas and that frequently there was no Saturday production (Board Exhibit 45). Reports from July, November and December of 1974 through 1977 show that Saturday work was more frequent in those years than in

1978, but that production on the lines that operated on Saturdays was not as high as during the week (Board Exhibit 47). Thus, it appears that not all employees worked on Saturdays even when production was necessary, and this is true of the Saturdays preceding the Thanksgiving holidays.

A computer printout of the Saturday preceding July 4, 1978, shows that over 80 maintenance employees did work on that day (Respondent's Exhibit 19).

Prior to the cessation of negotiations in March, 1978, the Union and the Company had tentatively agreed to a management rights clause to be incorporated into the final contract. This clause gave management the right to schedule operations and production, and the right to determine schedule and hours of work, subject only to the provisions of the executed contract which might specifically limit those rights (Respondent's Exhibit 17, p. 4).

DISCUSSION

The Board contends that the Company violated the Court's decree by unilaterally reducing the work schedule of employees through the elimination of Saturday work preceding the 1978 Fourth of July holiday.

Once a bargaining impasse has been reached in negotiations between the parties, the employer may effect unilateral changes to the extent of its best offer to the Union, so long as there is notice to and consultation with the Union. *McLean v. NLRB,* 333 F.2d 84, 87 (6th Cir. 1964). In the case at bar, there was clearly no prior notification or bargaining with the Union concerning the plant shutdown on July 3, 1978. However, it is not clear that this shutdown was a unilateral action which would violate the Court Order. The evidence shows that, in the past,

the plant was usually shutdown on the Friday following a Thursday holiday or on Monday preceding a Tuesday holiday. Production was often scheduled on the Saturdays before such shutdowns, but it is not clear as to whether all production lines were in operation nor if all employees were permitted to work. Further, the evidence indicates that all Saturday work on the lines was directly related to Company production needs. In fact, the 80 employees who worked on the Saturday preceding July 4, 1978, were maintenance, and not production, employees. Considering the foregoing, there is no convincing evidence that the Company had ever guaranteed the employees a 40-hour work week.

Although a company's economic situation is not justification for a unilateral change in company policy, *Flowers Baking Co.*, 169 NLRB 738, n. 2, 746, *enf'd.* 418 F.2d 244, 245 (5th Cir. 1968), it can be, and in this case appears to be, the basis of a company's past practice in regard to scheduling. Where the company has merely continued a past practice, it is not a unilateral change in company policy and no notification to the Union is required. *Stratford Industries, Inc.*, 215 NLRB 117, 88 LRRM 1240 (1974).

The Board has not established that the Company deviated from any past practice in regard to its determination not to schedule production on the Saturday preceding the Fourth of July in 1978. Also, once an impasse was reached the Company could continue its practice of scheduling production which was in accord with the tentatively agreed to Management Rights clause of the contract.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. In 1978 July Fourth fell on a Tuesday and it was a paid holiday for Company employees.

2. In 1978 employees were given Monday, July 3, off in connection with the July Fourth holiday. Employees were not paid for July 3.

3. When a holiday falls on a Tuesday or Thursday, it is Company practice to be open on the preceding Saturday if production is needed.

4. In 1978 there was no regular Saturday production work.

5. Production on Saturday in July, November and December of 1974 through 1977 was not as high as production on weekdays.

6. Over 80 maintenance employees worked on Saturday, June 30, 1978.

7. The Company's economic condition is the basis of the Company's past practice in regard to scheduling.

8. The Company's decision not to schedule production on Saturday, June 30, 1978, was in accord with past practice, was not a unilateral change, and no notification to the Union was required.

CONCLUSION OF LAW

The Court Order of January 13, 1978, was not violated when the Company did not schedule production work on Saturday, June 30, 1978.

IX

In amended pleadings, the Board alleged that the Company unilaterally transferred bargaining unit work from

its Magnolia plant to other facilities without prior notice to the Union. On this issue, Mr. Smith testified that, in the summer of 1978, he heard about Company expansions in North Carolina, Florida and Oklahoma. He thereupon wrote to the Company to inquire as to the nature of these expansions and requested information about those plants (Tr. 226-227; Board Exhibit 20). He testified that the Company informed him that there were plants in North Carolina and Florida but that they had no connection with or effect upon the McComb, Mississippi, plant. Since the Union was not the certified representative for the other plants, the information about them would not be supplied to Mr. Smith (Tr. 228; Board Exhibit 21).

Upon cross-examination, Mr. Smith testified that the Union sent official representatives to Fair Bluff, North Carolina, and Orlando, Florida. Concerning the Fair Bluff plant, the representatives first reported that the plant was not in operation. Later they reported that there were approximately 100 employees in the plant and it was in operation. Union representatives in Orlando, Florida, reported that the Company's facilities were located in an old building in Orlando where they were making dies and machinery of some type. However, on the outskirts of Orlando, a large new plant was being built and it was not yet in operation. The representatives did not report that machinery or equipment had been shipped from Magnolia to Fair Bluff, but Mr. Smith stated that he received a report from Magnolia employees that the Company had taken a press or two from Magnolia and sent it to North Carolina (Tr. 354-356).

Mr. Otha Cothern, an area superintendent at the Magnolia facility, testified on this issue in behalf of the Company. Upon direct examination, Mr. Cothern testified that, to his knowledge, he was not aware whether any of the

equipment or machinery on the 800 line had been transferred, moved out, or shipped from the Magnolia facility to any other facility. Mr. Cothern is the supervisor of the 800 line and has been since at least April of 1978 (Tr. 1105-1107).

DISCUSSION

The issue is whether the Company has unilaterally transferred bargaining unit work from its Magnolia, Mississippi, plant to other facilities without prior notice to or bargaining with the Union.

An employer does violate section 8(a)(5) of the National Labor Relations Act when work is transferred out of the bargaining unit without prior notice to or bargaining with the Union. *Fibreboard Board Products Corp. v. NLRB,* 379 U.S. 203, 215 (1965). However, in this case, the Board has not presented any convincing evidence in support of their allegation that work was transferred from Magnolia, Mississippi, to its plants in North Carolina and Florida. Mr. Smith testified that several unidentified employees reported that a press or two had been shipped from Magnolia to Fair Bluff, North Carolina. However, he also testified that Union representatives who visited the Fair Bluff plant did not find that any machinery or equipment had been shipped there from Magnolia. Also, the new Florida plant was not in production. The inference that the shutdown of the 800 line in Magnolia was the result of the transfer of work to Fair Bluff or any other facility is not supported by the record. The evidence presented in connection with other issues shows that lines were often shut down when inventories reached a certain level or when material was unavailable.

The Board's motion to compel the company to produce records of customers served from its Fair Bluff, North

Carolina, and Orlando, Florida, facilities was denied. I found that the Board had not produced sufficient evidence to show that such records were relevant to the Union's position as bargaining representative. Further, the possibilities for abuse of the information contained in such records outweighed the Board's alleged necessity to examine the records. The court in *Utica Observer-Dispatch v. NLRB*, indicated that, if the record showed that there was a particular need for confidentiality of information, then it would not have to be supplied. 229 F.2d 575, 576 (2nd Cir. 1956). The record here shows the need for confidentiality.

The Board has presented no probative evidence to establish that either the Act or the Court Order was violated.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The Company owns plants in Fair Bluff, North Carolina, and Orlando, Florida.

2. The Union is not the certified representative of the North Carolina and Florida plants.

3. Union representatives found no evidence to indicate that work was being transferred from the Magnolia, Mississippi, plant to either the North Carolina or Florida plants.

4. The Board did not produce sufficient evidence to show that customer records from the North Carolina and Florida plants were relevant to the Union's position as bargaining representative.

5. The information contained in the Company's customer records can be abused and thus there is a particular need for the confidentiality of such records.

CONCLUSION OF LAW

The Board has not shown that the Court Order of January 13, 1978, was violated since there is no evidence that work has been transferred out of the Magnolia, Mississippi, plant.

X

The Board alleges that the Company has disobeyed paragraph (t) of the Order by failing to mail to each of its present and former employees the notices supplied by the Board, by April 15, 1978, a reasonable time after having received them.

The parties have stipulated that, on March 15, 1978, the Company was first presented with 500 copies of the notices to be mailed to employees' homes. On March 29, 1978, 1,650 additional notices were mailed to the Company for mailing to employees' homes, which were received by the Company during the first week of April, 1978. An additional 300 notices were mailed to the Company in the first part of May at its request (Joint Exhibit 1, page 3, items 9 and 10).

In support of the Board's allegation, Mr. Kelly Baird, a Board compliance officer, testified that he or Mr. Brooks, a Board attorney, had suggested to the Company on March 15, 1978, that the Union should be shown a copy of the employee list so that no one who should receive a copy of the notice would be missed. However, there was no suggestion made that, before the notices were mailed, the Union would have to approve the names on the list provided by the Company (Tr. 393). At the meeting on March 15, 1978, the Board gave the Company 500 notices and indicated that the rest of the notices would be provided shortly (Tr. 394). When Mr. Jean Kuyrkendall was

given these 500 notices, he said that they would get with it right away. Thereafter the Company informed Mr. Baird that it would forthwith begin mailing the 500 notices which had been provided (Board's exhibit 34; Tr. 395).

In April Mr. Brooks informed Mr. Baird that the Union was complaining that the notices had not been sent. Mr. Baird then contacted Mr. Cowherd on the matter. Mr. Cowherd indicated to Mr. Baird that the notices had not been mailed. The list for mailing had been completed but Mr. Cowherd was wondering about a decision to be handed down shortly in Washington pertaining to this case (Tr. 400). That decision was related to whether additional violations of the Court Order had been found. Such might call for a new notice (Tr. 400). Mr. Cowherd stated to Mr. Baird during the conversation that the notices would not be mailed at that time because it would be a waste of the client's money (Tr. 400). At that time, Mr. Cowherd did not say that there was a Company policy against sending out notices piecemeal. During that conversation, Mr. Cowherd requested an additional 150 notices and the Board sent him 300 (Tr. 402-403). Mr. Baird indicated that he did not have any specific knowledge as to how notices were mailed out, *i.e.*, whether they are piecemealed or not, when mailing is called for (Tr. 937).

Upon cross-examination, Mr. Baird stated that it was not until early March that it was determined that 2,000 notices would be required (Tr. 924). At that time Mr. Baird told the Company to supply to the Union a list of employees to whom notices would be mailed (Tr. 924-925).

On the Company's behalf, Mr. Jean Kuyrkendall testified that, when he first heard about the settlement, he was concerned about the language in paragraph (t) that stated the notices were to be mailed to employees immediately (Tr. 1227-1228). He communicated this concern

to Company counsel who discussed the problem with Board counsel. Mr. Kuyrkendall was then advised that the Board agreed to change the word "immediately" to "forthwith," and "that they would work with us on it, recognizing that we had a problem" (Tr. 1228).

Mr. Kuyrkendall testified that, on March 15, 1978, he had received enough notices to place on all the bulletin boards. He also stated his belief that, at the March 15 meeting, Mr. Baird indicated that the Company should provide the Union with a list of the employees that notices were being mailed to and thus give Mr. Smith an opportunity to express approval, disapproval or to provide additional names (Tr. 1229). Mr. Kuyrkendall further testifieid that he received 500 notices on March 15 and that he was not told by Mr. Baird or Mr. Brooks to begin mailing them that day or as soon as he got back to the plant (Tr. 1229).

Mr. Kuyrkendall's testimony also indicated that the first employee list was completed about April 26, 1978. The list was then sent to Mr. Smith with a copy to Mr. Baird. Mr. Smith's response to the list was that he had no way of knowing if it was correct. Mr. Baird did inform the Company that the list was not complete. The Company then proceeded to rework the list, adding some "active people" to it. The Company began to mail the notices on the 8th or 9th of May 1978 (Tr. 1230).

Mr. Kuyrkendall testified that in the past when information has been mailed to employees' homes, it was sent out at the same time to everyone. Notices have never been mailed out on a piecemeal basis (Tr. 1231).

DISCUSSION

Paragraph (t) of the Court Order required the Company to forthwith mail to each of its present employees and to each of its former employees, employed since the entry of the Court's judgment of May 7, 1975, a signed notice. The issue centers on whether the requirement of "forthwith mailing" was met by the Company which, the evidence shows, did not mail the notices until May 9, 1978.

"Forthwith" is not capable of precise definition. The Court in *U.S. ex rel. Carter v. Jennings*, 333 F.Supp. 1392 (E.D. Pa. 1971), quoted Black's Law Dictionary (1951) which definies "forthwith" as:

> "Immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch . . . within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished . . . . The first opportunity offered."
>
> 333 F.Supp. at 1397

And in *U.S. v. Bradley*, a case dealing with a search warrant, the court stated that, in its view, "the word 'forthwith' is deliberately undefined . . . . to allow courts to interpret it in the context of 'reasonableness,' on a case by case basis." The court was convinced that " 'forthwith' requires no more or less than reasonable promptness, diligence or dispatch, . . . considering the difficulties actually encountered in attempting to perform the task." 428 F.2d 1013, 1016 (5th Cir. 1970). Thus, it is clear that "forthwith" does not command compliance within a definite period of time, but rather "forthwith" must be interpreted according to a "reasonableness" standard under the circumstances of the case.

The evidence in this case shows that the Board did not even begin to supply the Company with notices until March 15, 1978—a date two months after the entry of the Court Order. The Company did not receive the full amount of required notices from the Board until early May, 1978. Originally, then, the Board appears not to have been too concerned with promptly supplying the Company with notices. It was, therefore, impossible for the Company to act under paragraph (t) prior to March 15, 1978.

In addition, when the Board first began to supply the notices, it suggested to the Company that it should furnish the Union with an employee list to ensure that all entitled employees would receive a copy of the notice. This suggestion proved ambiguous and led the Company to believe that the Union should approve the employee list prior to mailing the notices. Such an interpretation of this suggestion from a Board officer does not seem unreasonable and the Company did, in fact, send an employee list to the Union for approval at the end of April.

On this issue, consideration must also be given to the fact that the original draft of paragraph (t) of the Court Order contained the word "immediately" rather than "forthwith." The wording was changed when it was made known to the Board that the Company would require some time to compile employee lists before compliance would be possible. The Board was aware at that time of some of the problems that would be involved in the mailing of the notices and took them into account in the rewording of paragraph (t).

Further, the Company policy not to mail the notices on a "piecemeal" basis, but to send them all at the same time, is a reasonable one. Such a policy avoids complaints by employees who do not receive notices at the same

time that other employees receive theirs. And clearly the Company mailed the notices promptly once it received the required amount for a complete mailing.

Upon consideration of all the evidence, it is my conclusion that the Company cannot be found to have acted unreasonably and so did not violate the Court Order.

I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The Company required over 2,000 notices in order to comply with paragraph (t) of the Court Order.

2. The Company received 500 notices from the Board on March 15, 1978, 1,650 notices during the first week of May, 1978, and an additional 300 notices shortly thereafter.

3. It was not unreasonable for the Company to interpret the Board's suggestion of submitting an employee list to the Union for approval as a necessary requirement for compliance prior to mailing the notices to employees.

4. The Board knew that it would take the Company some time to compile employee lists for the mailing and agreed to change the original draft of the settlement order from requiring "immediate" mailing to a requirement of "forthwith" mailing.

5. It was not unreasonable for the Company to mail the notices to all the employees at the same time rather than mail them on a piecemeal basis.

6. The notices were mailed to employees on or about May 9, 1978, shortly after the required number of notices was received from the Board.

7. The evidence shows that, under the circumstances surrounding this issue, the Company mailed the notices "forthwith."

CONCLUSION OF LAW

The Company did not violate paragraph (t) of the Court Order of January 13, 1978.

XI

The Board has alleged that Joseph Bancroft and Jean Kuyrkendall are individually liable as corporate officers for violations of the Court Order and should thus be found in civil contempt.

Joseph Bancroft is the chairman of the board and chief executive officer of the Company. Mr. Bancroft appointed Mr. Jean Kuyrkendall to the position of labor representative for the Company (Tr. 1156, 744). At all times, Mr. Bancroft was kept fully informed about Company negotiations with the Union through discussions with Mr. Kuyrkendall. Mr. Bancroft gave his opinion on Company proposals and no proposal with which he disagreed was ever submitted to the Union (Tr. 747-748).

Mr. Jean Kuyrkendall is the executive vice president of the Company and responsible for the supervision of all personnel matters and all Company contact and dealings with the Union. He was a member of the Company's bargaining committee and was present and participated in all bargaining sessions during 1978. He also was active in the formulation of Company policy and reviewed all Union proposals submitted during negotiations (Tr. 743-744, 1151, 1155-1156). Finally, he was primarily responsible for signing and mailing the required Board notices to Company employees and for putting into effect the

Company's new merit evaluation forms as agreed upon with the Union (Tr. 1227-1230, 1262-1263).

Both Mr. Bancroft and Mr. Kuyrkendall were well aware of the terms of the Court Order. Mr. Bancroft had signed the settlement for the Company (Tr. 748) and Mr. Kuyrkendall had been involved in negotiations with the Board as to its terms (Tr. 1228).

DISCUSSION

A court order is binding on the Company as well as its "officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). In *Wilson v. United States,* 221 U.S. 361, 376 (1911), the Supreme Court stated that:

> "[A] command to a corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt."

The principle enunciated in *Wilson* has been frequently followed to hold corporate officers in civil contempt for their disobedience of an order directed to the corporation. *NLRB v. Johnson Manufacturing of Lubbock,* 511 F.2d 153, 156 (5th Cir. 1975).

Violations of the Court Order of January 13, 1978, in which the officers, agents, servants and employees of the Company were actively involved, may result in a finding that such persons are in contempt. Since the evi-

dence shows that both Joseph Bancroft and Jean Kuyrkendall were closely involved in and fully aware of all Company policies and activities affecting Union representation and compliance with the Court Order, I recommend that these officers be held in contempt of court for the violations which have occurred.

Based on the evidence, I reach the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. Mr. Joseph Bancroft, as chairman of the board and chief executive officer of the Company, was fully informed of Company dealings with the Union and well aware of the terms of the Court Order of January 13, 1978.

2. Mr. Jean Kuyrkendall, as executive vice president of the Company in charge of personnel matters and Company contact with the Union, participated in all bargaining sessions, was active in the formulation of Company policy, and fully aware of the terms of the Court Order of January 13, 1978.

3. The Court Order is binding not only on the Company but also its officers who receive actual notice of the order.

4. The corporate officers may be held in civil contempt for their disobedience of the order directed to the corporation.

5. The Court Order of January 13, 1978, has been violated.

CONCLUSIONS OF LAW

Joseph Bancroft and Jean Kuyrkendall may be held in civil contempt for violations of the Court Order of January 13, 1978.

The respondent filed a motion with the Court to dismiss Joseph Bancroft and Jean Kuyrkendall as individual parties in this action. In view of the foregoing, I recommend this motion be denied.

GENERAL FINDINGS OF FACT

1. The decrees of May 7, 1975, August 14, 1975, and January 13, 1978, have been in full force and effect since their entries and at all material times the Company, its officers and agents, have had notice and actual knowledge thereof.

2. Respondent's plant at Magnolia, Mississippi, the subject of the collective bargaining negotiations involved in this litigation, is engaged in the manufacture of windows and associated metal products. Application of the National Labor Relations Act to this plant is conceded by the respondent.

GENERAL CONCLUSIONS OF LAW

1. The Company has violated paragraphs (d), (f), (j), and (l) of the Court Order of January 13, 1978.

2. The Company and its officers, Joseph Bancroft and Jean Kuyrkendall, are in contempt of the Court Order of January 13, 1978.

RECOMMENDATIONS AS TO ORDER

In the preparation of these recommendations, I have considered all of the proposals submitted by the Board. The findings, above detailed, result in the conclusion that certain of the Board's proposals are not necessary. I have found that the following items provide a practical and meaningful remedy based on the facts in this case.

1. Having found that the Company and Joseph Bancroft and Jean Kuyrkendall have violated the Court's order of January 13, 1978, as to the items detailed above, I recommend that the Court adjudge Croft Metals, Inc., and its subsidaries, Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc. ("the Company"), and Joseph Bancroft, its chairman of the board of directors and chief executive officer, and Jean Kuyrkendall, its executive vice president, in civil contempt for violating and disobeying certain portions of the judgments of May 7, 1975, and August 14, 1975, and the Order of January 13, 1978.

2. I find that a lump sum as opposed to a daily fine is more appropriate in this case. Certain of the allegations have been determined to be unfounded. Also, no penalty should be attached to the period in which respondent has challenged the Board's petition—as is its right to do.

Considering all circumstances, I recommend that the court assess a fine of $50,000 for its past non-compliance with the provisions of the Court's previous order of which it has been found in contempt. This sum is appropriate and equitable for all parties. This is a civil proceeding and the sanction should not be penal but rather coercive or remedial. In addition, the record indicates the Union has not been entirely blameless in some of its dealings and negotiations with the Company. Likewise, the Board's attitude and tactics have not always been characterized by impartiality and fairness, and its demands upon the Company, at times, could be termed as "nit-picking."

I do not recommend fines against the cited corporate officers. The Board has not requested that fines be presently assessed against these officers. The finding that Joseph Bancroft and Jean Kuyrkendall are in civil con-

tempt is in itself coercive. Further, the proposed order recommends daily fines in the event of future non-compliance on the part of these officers.

3. To assure a cessation of the violations here found of the Court's judgments of May 7, 1975, and August 14, 1975, and to assure compliance with the Court's order of January 13, 1978, and with this recommended contempt adjudication, I recommend that the court assess a non-compliance fine against the Company and against President Joseph Bancroft and Vice President Jean Kuyrkendall. I recommend that daily fines of $2,500 per violation against the Company and $500 against Joseph Bancroft and Jean Kuyrkendall and any other individual, who with knowledge of this recommended order, acts in concert and participation with Company, Joseph Bancroft or Jean Kuyrkendall to violate said order, would be proper amounts in this case.

4. That in addition to the above, I recommend that the Court enter an order requiring the Company, its officers, agents, representatives, successors, and assigns, and Joseph Bancroft and Jean Kuyrkendall to purge themselves of such contempt by:

(a) Fully complying with and obeying this Court's judgments of May 7, 1975, and August 14, 1975, and order of January 13, 1978, and not in any way by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of the said judgments and order;

(b) Immediately reinstating the former practice of paying Christmas bonuses to leadmen and leadwomen, as previously requested by the Union, and making whole all leadmen and leadwomen for any monetary losses they may have suffered by reason of the Company's failure and refusal to reinstate the 1977 or

subsequent Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court; to continue the practice of paying Christmas bonuses subject to further negotiations about its discontinuance;

(c) If requested by the Union, immediately reinstating the former morning break scedule for glass department employees at its Magnolia facility which existed prior to the April 1978 unilateral change in schedules;

(d) Immediately restoring the *status quo ante* by resuming operations on line one of the Series 20 Department of the Magnolia facility which it unilaterally shut down on about April 14, 1978, and the two second shift lines of the Series 800 Department of said facility which it unilaterally shut down in about April and May, 1978; immediately offering to reinstate to their former positions all employees whom it unilaterally transferred to other jobs and departments as a result of the aforesaid shutdowns and the unilateral shutdown of the first shift in the Series 1400 Department from mid-April to about early May 1978, without prejudice to their seniority and other rights and privileges; making all of the aforesaid employees whole for any loss of earnings suffered by reason of their transfers, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court;

(e) Immediately rescinding the oral merit performance evaluation system or any other employee evaluation system unilaterally instituted since January 13, 1978, and immediately instituting the evaluation system agreed upon by the parties during bargaining on about March 9, 1978; and making all employees

whole for any loss of earnings suffered by reason of the Company's unilateral actions with respect to employee evaluations or its reneging on its agreement to implement a new evaluation system together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(f) In view of the "cooling off" period that the parties have experineced since March 10, 1978, I recommend that the Company, immediately, upon the Union's request, return to the process of bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is full agreement or it is clear that a bona fide impasse has been reached; if any understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without further order of the Court;

(g) Immediately, upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed fifteen (15) days from the entry of the adjudication, and thereafter proceeding to bargain for no less than two consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(h) Filing sworn reports signed by the Company and Joseph Boncroft and Jean Kuyrkendall, and by the Union representatives with the said Regional Director, every thirty (30) days showing in detail the nature and course of bargaining in summary form and appending thereto any minutes, proposals, counterproposals, and any written communications between the Union and the Company with respect to such bargain-

ing. If either party has exceptions to the contents of the joint summary, separate additional reports setting forth differences may be filed;

(i) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice strikers, and according such employees all the rights to which unfair labor practice strikers are entitled, including credit for a ten cent ($.10) merit wage increase found to have been awarded non-strikers during the period of the strike; and making said former strikers whole for any loss of earnings suffered by reason of the Company's failure to accord them all the rights to which unfair labor practice strikers are entitled, including its denial of credit for a merit increase of ten cents ($.10) per hour, together with interest thereon;

(j) Refraining from making unilateral changes in wages, hours, and working conditions including layoffs and transfer of employees and transfers of bargaining unit work, work breaks, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto;

(k) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

(l) Immediately posting in conspicuous places in its McComb, Mississippi, offices, and all places where notices to employees are customarily posted at its Magnolia, Mississippi, facility, and at all of its other manufacturing facilities for a period of sixty (60) consecutive days, copies of thiis contempt adjudication and of an appropriate notice in the form to be sup-

plied by the Board and signed by Joseph Bancroft, individually and as chairman of the board of directors and chief executive officer of the Company, and by Jean Kuyrkendall, individually and as executive vice president of the Company, which states that the Company, Joseph Bancroft, and Jean Kuyrkendall have been adjudicated in civil contempt of this Court for violating and disobeying and failing and refusing to comply with this Court's judgments and subsequent order, and that the Company, Joseph Bancroft and Jean Kuyrkendall will forthwith undertake the action ordered in purgation in the earlier order and this contempt adjudication, said notices, together with a copy of the order and this contempt adjudication, to be maintained in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced, or covered by any other material;

(m) Immediately duplicating at its own expense, signing by Joseph Bancroft or Jean Kuyrkendall, and mailing copies of the notice and the contempt adjudication to each of its present employees and to each of its former employees employed since the entry of the Court's order of January 13, 1978, and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed, together with proof of mailing;

(n) Requiring each office, director, and supervisor of the Company, and any individual or agent authorized by the Company to negotiate on its behalf, to signify in writing, under oath, that he or she has been furnished with a copy of the contempt adjudication and of the Court's judgments of May 7 and August 14, 1975, and order of January 13, 1978; and that he or

she has read and understands such decrees, and that he or she will conduct himself or herself in all respects consistent with the terms thereof and will in no way by action or inaction, engage in, induce, encourage, permit, or condone any violation of these decrees of the Court. Copies of the aforesaid acknowledgements shall be furnished by the Company to the regional Director of the Board's Fifteen Regional Office;

(o) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Regional Office within fifteen (15) days after the entry of the adjudication in contempt and again at the end of the posting period showing what steps have been taken by the Company and Joseph Bancroft and Jean Kuyrkendall to comply with the Court's directions;

(p) With respect to the Board's request that respondent bear all costs, including counsel fees incurred by the Board and the Union, in view of the finding of no liability as to five of the charges, I recommend that each party and the Union bear their own costs. Also, overall expenses in this case were unnecessarily increased due to some lack of harmony and cooperation existing between counsel for the parties as well as unanticipated delays which occurred through no fault of either party;

(q) Preserving and making available to the Board for inspection and copying, all books and records necessary or useful in determining whether there has been compliance with the provisions of the purgation order, and necessary or useful to analyze the amounts of backpay due employees or former employees thereunder;

(r) In its recommended order, the Board asks that Joseph Bancroft read to all employees the contents of

the contempt notice in the presence of a Board agent. The record shows Mr. Bancroft is 79 years of age and not active. I do not consider it necessary or proper that this suggestion of the Board be done. Nor do I consider it necessary for any Company officer to perform this act since notices will be required to be posted on bulletin boards and mailed to employees.

Attached as Appendix A is a recommended final order to implement the foregoing findings of fact and conclusions of law.

Dated this 4th day of December, 1979.

/s/ Cecil L. Cutler, Jr.
Cecil L. Cutler, Jr.
Special Master

APPENDIX A

RECOMMENDED FINAL ORDER

I

Respondents shall purge themselves of civil contempt by:

(a) Fully complying with and obeying this Court's judgments of May 7, 1975, and August 14, 1975, and order of January 13, 1978, and not in any way by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of the said judgments and order;

(b) Immediately reinstating the former practice of paying Christmas bonuses to leadmen and leadwomen, as previously requested by the Union, and making whole all leadmen and leadwomen for any monetary losses they may have suffered by reason of the Com-

pany's failure and refusal to reinstate the 1977 or subsequent Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court; to continue the practice of paying Christmas bonuses subject to further negotiations about its discontinuance;

(c) If requested by the Union, immediately reinstating the former morning break schedule for glass department employees at its Magnolia facility which existed prior to the April 1978 unilateral change in schedules;

(d) Immediately restoring the *status quo ante* by resuming operations on line one of the Series 20 Department of the Magnolia facility which it unilaterally shut down on about April 14, 1978, and the two second shift lines of the Series 800 Department of said facility which it unilaterally shut down in about April and May 1978; immediately offering to reinstate to their former positions all employees whom it unilaterally transferred to other jobs and departments as a result of the aforesaid shutdowns and the unilateral shutdown of the first shift in the Series 1400 Department from mid-April to about early May 1978, without prejudice to their seniority and other rights and privileges; making all of the aforesaid employees whole for any loss of earnings suffered by reason of their transfers, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court;

(e) Immediately rescinding the oral merit performance evaluation system or any other employee evaluation system unilaterally instituted since January 13, 1978, and immediately instituting the evaluation sys-

tem agreed upon by the parties during bargaining on about March 9, 1978; and making all employees whole for any loss of earnings suffered by reason of the Company's unilateral actions with respect to employee evaluations or its reneging on its agreement to implement a new evaluation system together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(f) Immediately, upon the Union's request, returning to the process of bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is full agreement or it is clear that a bona fide impasse has been reached, and if any such understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without further order of the Court;

(g) Immediately, upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed fifteen (15) days from the entry of the adjudication, and thereafter proceeding to bargain for no less than two consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(h) Filing sworn reports signed by the Company and Joseph Bancroft and Jean Kuyrkendall, and by the Union representatives with the said Regional Director, every thirty (30) days showing in detail the nature and course of bargaining in summary form and appending thereto any minutes, proposals, counterproposals, and any written communications between the Union and the Company with respect to such bar-

gaining. If either party has exceptions to the contents of the joint summary, separate additional reports setting forth differences may be filed;

(i) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice strikers, and according such employees all the rights to which unfair labor practice strikers are entitled, including credit for a ten cent ($.10) merit wage increase found to have been awarded non-strikers during the period of the strike; and making said former strikers whole for any loss of earnings suffered by reason of the Company's failure to accord them all the rights to which unfair labor practice strikers are entitled, including its denial of credit for a merit increase of ten cents ($.10) per hour together with interest thereon;

(j) Refraining from making unilateral changes in wages, hours, and working conditions including layoffs and transfers of employees and transfers of bargaining unit work, work breaks, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto;

(k) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

(l) Immediately posting in conspicuous places in its McComb, Mississippi, offices, and all places where notices to employees are customarily posted at its Magnolia, Mississippi, facility, and at all of its other manufacturing facilities, for a period of sixty (60) consecutive days, copies of this contempt adjudication and of an appropriate notice in the form to be supplied

by the Board and signed by Joseph Bancroft, individually and as chairman of the board of directors and chief executive officer of the Company, and by Jean Kuyrkendall, individually and as executive vice president of the Company, which states that the Company, Joseph Bancroft, and Jean Kuyrkendall have been adjudicated in civil contempt of this Court for violating and disobeying and failing and refusing to comply with this Court's judgments and subsequent order, and that the Company, Joseph Bancroft, and Jean Kuyrkendall will forthwith undertake the action ordered in purgation in the earlier order and this contempt adjudication, said notices, together with a copy of the order and this contempt adjudication, to be maintained in clearly legible condition through such posting period, and insuring that they are not altered, defaced, or covered by any other material;

(m) Immediately duplicating at its own expense, signing by Joseph Bancroft or Jean Kuyrkendall, and mailing copies of the notice and the contempt adjudication to each of its present employees and to each of its former employees employed since the entry of the Court's order of January 13, 1978, and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed, together with proof of mailing;

(n) Requiring each officer, director, and supervisor of the Company, and any individual or agent authorized by the Company to negotiate on its behalf, to signify in writing, under oath, that he or she has been furnished with a copy of the contempt adjudication and of the Court's judgments of May 7 and August 14, 1975, and order of January 13, 1978; that he or

she has read and understands such decrees, and that he or she will conduct himself or herself in all respects consistent with the terms thereof and will in no way by action or inaction, engage in, induce, encourage, permit, or condone any violation of these decrees of the Court. Copies of the aforesaid acknowledgments shall be furnished by the Company to the Regional Director of the Board's Fifteenth Regional Office;

(o) Filing a sworn statement with the Clerk of this court and a copy thereof with the Director of the said Regional Office within fifteen (15) days after the entry of the adjudication in contempt and again at the end of the posting period showing what steps have been taken by the Company and Joseph Bancroft and Jean Kuyrkendall to comply with the Court's directions;

(p) Preserving and making available to the Board for inspection and copying, all books and records necessary or useful in determining whether there has been compliance with the provisions of the purgation order, and necessary or useful to analyze the amounts of backpay due employees or former employees thereunder.

II

The Company shall pay the amount of fifty thousand dollars ($50,000) for its past non-compliance with the provisions of the Court's Order of January 13, 1978, of which it has been found in contempt.

III

To assure a cessation of the violations of the Court's judgments of May 7, 1975, and August 14, 1975, and to assure compliance with the Court's order of January 13,

1978, and with this contempt adjudication, this Court hereby imposes a daily fine for non-compliance against the Company in the amount of two thousand five hundred dollars ($2,500) and in the amount of five hundred dollars ($500) against Joseph Bancroft and Jean Kuyrkendall and any other individual who, with knowledge of this order, acts in concert and participation with the Company, Joseph Bancroft and Jean Kuyrkendall to violate this order. The assessment of such fines shall commence 15 days from the entry of the foregoing order and continue so long as the respondents fail to comply with any of the provisions of this order.

IV

Upon the failure of respondents to purge themselves of civil contempt, the Court reserves jurisdiction to issue attachment against them and any officer or agent of the Company responsible therefor, as well as to substantially increase the amount of compliance fines, and the Court shall take other and further action, and grant such other and further relief as may be adjudged just, reasonable, and necessary to assure compliance with the Court's previous judgments and order, and as this proceeding in civil contempt may require.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 74-3052
74-3101

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BANCROFT MANUFACTURING COMPANY, INC.,
CROFT ALUMINUM COMPANY, ET AL,
Respondents.

Petitions for Adjudication in Civil Contempt
and Other Civil Relief

ON PETITION FOR REHEARING

(Filed March 17, 1981)

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL. Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/s/ Robert Ainsworth, Jr.
United States Circuit Judge

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*Judge of the United States Court of Claims, sitting by designation.

ARTICLE .....

MANAGEMENT RIGHTS

Section 1.

The management of the Employer's business and all properties and the direction of the working force, including the right to promulgate, introduce, establish, maintain, and revise reasonable work rules and/or plant rules and regulations; to promote, to transfer, to hire, to suspend, to lay off, discipline or discharge for a good cause, including, but not limited to, violation of its rules and regulations, to increase or decrease the working force, to determine the products to be manufactured and the place where they are to be manufactured and to determine the products to be handled and the method of handling same, and the equipment to be used in connection therewith; and the exclusive right to determine, change, classify or alter jobs, job contents, to schedule operations and production; and to determine the methods, processes, and means of manufacturing schedules and hours of work and methods of pay, to introduce new methods, techniques and/or machines, and to introduce more efficient machinery, processes or methods, to operate as efficiently as possible and to improve the skill and ability of its employees, to determine the methods of operations and processes and means of distribution and the handling of same, the size and layout of the plant inventories, and to shut down permanently or temporarily any operation in whole or in part, and to sub-contract, are vested exclusively in the Employer, subject only to such regulations and restrictions governing the exercise of such rights as are expressly provided for in specific provisions of this Agreement and any violation thereof of any such specific pro-

visions will be subject to the Grievance Procedure established in this Agreement.

Section 2.

It is understood between the Union and the Employer that all of the rights heretofore exercised by the Employer are inherent in the Employer as the owner, and those rights not expressly contracted away by a specific provision of this Agreement are retained solely and exclusively by the Employer and may be impaired only with the express specific consent of the Employer as may be expressed elsewhere in this Agreement.